Malayan Banking Berhad, N.Y. Branch v Park Place Dev. Primary LLC
2022 NY Slip Op 33997(U)
November 18, 2022
Supreme Court, New York County
Docket Number: Index No. 850083/2020
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

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INDEX NO. 850083/2020

MOTION DATE

MOTION SEQ. NO. 004

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 COMPANIES NEW YORK, 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 004) 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 375, 376, 377, 380, 381, 382, 383, 385, 390, 393, 396, 403, 411, 418, 422, 426, 430, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 478, 492, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575,

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

Upon the foregoing documents, the motion and cross-motions are 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 ("43 Park Project"). 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. By deed dated the same day as the Building and Project Agreements, Borrower took assignment 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.

Concomitantly with the 43 Park Project, non-party Park Place Development Secondary LLC ("Park Place Secondary") entered a Mezzanine Facility Agreement ("Mezzanine Agreement"), dated May 17, 2016, with non-party Berni ("Berni"), a financier. The Mezzanine Agreement states that Park Place Secondary's "affiliate", Borrower, proposed construction of 50 residential condominium units at a premises identified as 45 Park Place, New York, New York ("45 Park Project"), contained within the Borrower Premises. Park Place Secondary was, at the time, the sole member of Borrower. The agreement provided that Berni would provide a maximum of $65,250,000.00 to finance the 45 Park Project. Unlike the Building and Project transactions which were secured by mortgages on Borrower Premises (Lot 8), the collateral for this loan was principally Park Place Secondary's interest in both Borrower and a payment reserve account to be established by Park Place Secondary. Thereafter, Park Place Secondary and Berni entered two amendments of the Mezzanine Agreement, dated October 31, 2017, and July 24, 2018, respectively. The First Amendment modified Section 7.33 and Schedule 6, which related to the payment reserve account. The Second Amendment changed the Mezzanine Facility maximum to $76,462,329.00, an increase of $11,212,329.00.

Complicating this multifaceted development project was the nature of the financing underlying the above transactions. As the parties are adherents to Islamic Shariah Law, charging interest in return for borrowed sums is prohibited. The structure of the financing is referred to as a Murabaha which usually translates to a cost-plus markup sale. It is described in Article 4 of the Building and Project Facility Agreements and in a document called a Shariah Pronouncement, which is a religious approval of the transaction. In this case, that pronouncement was issued by Maybank Islamic on March 30, 2016. The Mezzanine Agreement contains a similar scheme involving the purchase of "Commodities". Distilled to its essence, in lieu of paying interest, pursuant to Article 4 of the Facility Agreements, titled "Revolving Purchase Facility", the Borrower and Plaintiff would engage in a purchase and sale of "Metals" whereby the amount of profit was agreed in advance. In practice, Plaintiff, on behalf of non-

parties Malayan Banking Berhad, London Branch, Intesa Sanpaolo S.P.A., New York Branch, Warba Bank K.S.C.P., and 45 Park Place Investments, LLC ("Financiers"), supplied funding to Borrower upon receipt of requests for the purchase of "Metals" which would fund the construction at issue. Subsequently, Borrower was obligated to repay the funds to Plaintiff via a deferred sale price, calculated by adding the purchase price of the Metals earlier advanced by Plaintiff plus, in lieu of interest, an agreed profit on the sales. This sum, as well as a supplemental profit, if applicable, and all other sums due and payable under the Notes and the other agreements, was due on April 26, 2019, the Termination Date.

Both the Project and Mezzanine Agreements reference and adopt terms from the Building Agreement. For instance, the Project agreement expressly adopts, *inter alia*, the recitals, numerous definitions and the financing structure (Article 4) contained in the Building Agreement. The Mezzanine Agreement states: "All initially capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Building Facility Agreement (as defined below)". The Building Agreement also references the Mezzanine Agreement and states under Section 13.1[u] that Borrower and Park Place Secondary, as sole member of same, shall not, without the prior written consent of Plaintiff "create, incur, assume or suffer to exist any obligations of either Obligor or Sole Member (whether personal or nonrecourse, secured or unsecured, subordinate or otherwise), except for (i) the Facility, (ii) any trade credit incurred in the ordinary course of Obligor's business, and (iii) the Mezzanine Facility".

When the loans matured, the Borrower defaulted in repayment, one of several claimed defaults. Plaintiff commenced the within action against Borrower 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, eleven 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 mechanic's liens pursuant to the Lien Law.

Gilbane Residential Construction LLC ("Gilbane") answered and pled nine affirmative defenses as well as six crossclaims and a counterclaim. The sixth crossclaim and counterclaim seek foreclosure of its mechanic's lien, a determination of the extent and priority of each lien and a determination that Gilbane's mechanic's lien is superior to all other liens on the premises, including Plaintiff's mortgage.

Permasteelisa North America Corp. ("PNA") answered and pled seven affirmative defenses as well as six crossclaims and a counterclaim. The fourth crossclaim and counterclaim seek foreclosure on its mechanic's lien, a determination of the extent and priority of each lien and, ostensibly, a determination that PNA's mechanic's lien is superior to all other liens on the premises, including Plaintiff's mortgage.

US Crane & Rigging LLC ("USCR") answered and pled eight affirmative defenses as well as six crossclaims and a counterclaim. The fourth crossclaim and first counterclaim seek foreclosure on its mechanic's lien, a determination of the extent and priority of each lien and, ostensibly, a determination that USCR's mechanic's lien is superior to all other liens on the premises, including Plaintiff's mortgage.

Transcontinental Steel Corp. ("Transcontinental") answered and pled twenty-six affirmative defenses as well as five crossclaims, including for foreclosure of its lien, but no counterclaim.

S&E Bridge & Scaffold LLC ("S&E") answered and pled four affirmative defenses as well as six crossclaims and two counterclaims. The third and sixth crossclaims as well as the first and second counterclaims seek foreclosure of its mechanic's lien, a determination of the extent and priority of each lien and, ostensibly, a determination that S&E's mechanic's lien is superior to all other liens on the premises, including Plaintiff's mortgage.

Ismael Leyva Architect, P.C. ("Ismael") answered and pled eight affirmative defenses as well as six crossclaims and a counterclaim. The first crossclaim and counterclaim seek to foreclose on its mechanic's lien, a determination of the extent and priority of each lien and, ostensibly, a determination that Ismael's mechanic's lien is superior to all other liens on the premises, including Plaintiff's mortgage.

Construction Realty Safety Group ("CRS") and Trade Off Plus, LLC ("Trade Off Plus") answered jointly and pled ten affirmative defenses as well as three crossclaims and a counterclaim. The first crossclaim and counterclaim seek to foreclose on its mechanic's lien, a determination of the extent and priority of each lien and, ostensibly, a determination that the CRS and Trade Off Plus mechanic's liens are superior to all other liens on the premises, including Plaintiff's mortgage.

Men of Steel Rebar Fabricators LLC ("Men of Steel") answered and pled six affirmative defenses as well as three crossclaims and a counterclaim. The first crossclaim and counterclaim seek to foreclose on its mechanic's lien, a determination of the extent and priority of each lien and, ostensibly, a determination that Men of Steel's mechanic's lien is superior to all other liens on the premises, including Plaintiff's mortgage.

Peri Formwork Systems, Inc. ("Peri") answered and pled eight affirmative defenses as well as one counterclaim, two crossclaims and five third-party claims. The first crossclaim and counterclaim seek to foreclose on its mechanic's lien, a determination of the extent and priority of each lien and, ostensibly, a determination that Peri's mechanic's lien is superior to all other liens on the premises, including Plaintiff's mortgage.

Now, Plaintiff moves for no less than nine forms of relief which are as follows:

1. Pursuant to CPLR §3212[e], severing and granting Plaintiff summary judgment against Defendants Gilbane, PNA, USCR, Transcontinental, S&E, Ismael, CRS and Trade Off Plus as well as defendant State of New York Civil Recoveries Bureau for all of the relief requested in the First Amended Verified Complaint, including judgment of foreclosure and sale.

2. Pursuant to CPLR §3211[a][7] and CPLR §3212, dismissing and granting summary judgment on the counterclaims asserted by Defendants Gilbane, PNA, USCR, S&E, Ismael, CRS and Trade Off Plus.

3. Pursuant to CPLR 3211[b], dismissing with prejudice the affirmative defenses asserted by Defendants Gilbane, PNA, USCR, Transcontinental, S&E, Ismael, CRS and Trade Off Plus.

4. Pursuant to CPLR §3211[b], §3211[a][7] and §3212, dismissing and granting summary judgment on the counterclaim and affirmative defenses of Men of Steel.

5. Pursuant to CPLR §603, severing the third-party claims and crossclaims of Gilbane, PNA, USCR, S&E, Ismael, CRS, Trade Off Plus and Men of Steel.

6. Pursuant to CPLR §3215 and RPAPL §1321, granting Plaintiff a default judgment against defendants Park Place Development Primary LLC, 45 Park Place Partners, LLC, Soho Properties General Partner, LLC, Sharif El-Gamal, All-City Metal Inc., ULE Group Corp. d/b/a United Lighting Electrical Corp., New York State Department of Taxation and Finance, New York City Environmental Control Board.[1]

7. Pursuant to CPLR §3217[b], discontinuing, without prejudice, the claims and causes of action asserted by Plaintiff against Peri Formwork Systems, Inc.

8. Amending the caption of the action by excising the Defendants named as "JOHN DOES 1-100".

9. Pursuant to RPAPL §1321 and §1325, appointing a referee to compute.

Defendants PNA, S&E and USCR all separately oppose Plaintiff's motion and cross-move for partial summary judgment determining Plaintiff's mortgage liens are subordinated to their mechanic's liens. Defendant Gilbane opposes the motion and cross-moves pursuant to CPLR §3212 for summary judgment dismissing Plaintiff's complaint[2] or, in the alternative, for leave to amend its answer. Unlike Defendants PNA, S&E and USCR, Gilbane does not seek summary judgment determining Plaintiff's mortgage liens are subordinated to its mechanic's lien. Rather, it argues that such a finding defeats Plaintiff's *prima facie* case for summary judgment on its foreclosure cause of action. Defendants CRS and Trade Off Plus oppose Plaintiff's motion. Defendant Museum Owner opposes that branch of Gilbane's cross-motion to amend its answer to add crossclaims. Defendants Transcontinental, Ismael, Men of Steel and Peri[3] did not file opposition, but Gilbane seeks to be substituted in place of the first three as assignee of their liens.

"[T]he proponent of a summary judgment motion 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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324). Once a *prima facie* demonstration has been made, the burden shifts to the opposing party to establish the existence of a triable material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]).

On a foreclosure cause of action, a plaintiff is required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of the mortgagor's

[1] Pursuant to a stipulation dated March 5, 2021, this branch of Plaintiff's motion was withdrawn as to Defendants Sharif El-Gamal, Borrower, 45 Park Place Partners, LLC and Soho Properties General Partner, LLC only.

[2] This branch of the motion fails. Gilbane incorporated by reference the arguments concerning failure to join a necessary party in Motion Sequence Number 5, which was denied in an earlier order of this Court.

[3] The action against Peri was discontinued (NYSCEF Doc No 276).

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 this *prima facie* case must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]).

The branch of Plaintiffs' motion for summary judgment on its foreclosure cause of action was supported with an affidavit from Ahmad Hamdi Bin Abdullah ("Abdullah"), the General Manager of Malayan Banking Berhad, New York Branch. Other than to state that he was "fully familiar with the facts set forth" Abdullah did not attest to having personal knowledge of the transactions underlying the Borrower's account and default (*see JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513, 1517 [2d Dept 2019]; *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206 [2d Dept 2019]["a witness may always testify as to matters which are within his or her personal knowledge through personal observation"]). To the extent Abdullah's knowledge was based upon a review of records, which is not expressly indicated, those records must be proffered in admissible form for any statements regarding Borrower's loans and defaults to be established (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]). A naked "review of records maintained in the normal course of business does not vest an affiant with personal knowledge" *JPMorgan Chase Bank, N.A. v Grennan*, supra).

Although the various, notes, mortgages and other documents at issue were annexed to Abdullah's affidavit, no foundation whatsoever for the admission of any of these records into evidence under CPLR §4518 was proffered (*see Berkshire Bank v Fawer*, 187 AD3d 535 [1st Dept 2020]; *Deutsche Bank Natl. Trust Co. v Kirschenbaum,* 187 AD3d 569 [1st Dept 2020]; *Wells Fargo Bank, N.A. v Sesey,* 183 AD3d 780 [2d Dept 2020]; *U.S. Bank N.A. v Kochhar*, 176 AD3d 1010 [2d Dept 2019]). Absent these records being in evidentiary form, all Abdullah's statements regarding the salient documents and Borrower's default are inadmissible (*see U.S. Bank N.A. v Moulton*, 179 AD3d 734, 739 [2d Dept 2020]; *Bank of Am., N.A. v Huertas*, 195 AD3d 891 [2d Dept 2021]). Also missing from any of the moving papers, in particular the affidavit of Abdullah, is an explanation of the anomaly which has the mortgages dated before the deed. This renders Plaintiff's *prima facie* case defective and raises the specter of the mortgages being invalid (*see* RPL §240-b[1]; *Gray v Delpho*, 97 Misc 37 [Sup Ct Oneida Cty, 1916]).

In Gilbane's opposition to Plaintiffs' motion as well as in USCR's affirmation in support of the branch of its motion for partial summary judgment determining the priority of its liens, they posit that since the Building and Project Mortgages were executed on April 26, 2016, some three weeks before Museum Owner deeded the property to Borrower, the mortgages are *void ab initio*. It is long established in statute and common-law that the conveyance of *any* interest in real property is only effective upon delivery of the written instrument creating the interest (*see* RPL §244; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 511-512 [1979]; *ERHAL Holding Corp. v Rusin*, 229 AD2d 417, 419 [2d Dept 1996]). As such, "[a] mortgage . . . only takes effect from the time of delivery" (*Schafer v Reilly*, 50 NY 61, 66 [1872]). The necessity for such a requirement is practical and serves the commonplace practice that parties draft and sign instruments of conveyance before consummation of a transaction (*see 219 Broadway Corp. v Alexander's, Inc.*, supra). "By requiring delivery, the law facilitates the true expectations of the parties by ensuring that the interest in the property is not conveyed until that moment when the parties so intend" (*id.* at 512).

Gilbane and USCR are correct that the date affixed to a conveyance, in this case April 26, 2016, for the mortgages and May 17, 2016, for the deed, creates a presumption that a conveyance was delivered and accepted at its date (*see Purdy v Coar*, 109 NY 448 [1888]). However, this presumption

is not absolute and may be rebutted by evidence of the underlying transaction (*see Ten Eyck v Whitbeck*, 156 NY 341, 352 [1898]). Plaintiff raised an issue of fact on this point with Abdullah's affidavit in opposition to the cross-motions wherein he averred that the Building and Project Mortgages were intentionally executed in advance as matter of convenience and were not intended to be effective or delivered until ownership of the Borrower Premises was transferred by Museum Owner's deed. Abdullah's affidavit also evidenced that the staggered execution of the transaction documents was not "a secret effort made to evade the necessity of filing" under the Lien Law (*Dickinson v Oliver*, 195 NY 238, 248 [1909]). While sufficient to defeat summary judgment, proffering this evidence in reply to rectify deficiencies in Plaintiffs' moving papers is improper (*see generally Starr Indem. & Liab. Co. v U.S. Adjustment Corp.*, 198 AD3d 551 [1st Dept 2021]).

Accordingly, Plaintiffs failed to demonstrate *prima facie* entitlement to summary judgment on their foreclosure cause of action and for the appointment of a referee to compute. Plaintiffs also raised an issue of fact as to whether the Building and Project Mortgages are invalid defeating the branch of Defendant USCR's cross-motion based on that issue.

With respect to the mechanic's lienors' counterclaims for foreclosure and subordination, Plaintiff, by moving to dismiss these claims pursuant to CPLR §3211[a][7], was required to establish either that the counterclaims are facially insufficient (*see 298 Humboldt, LLC, v Torres*, 197 AD3d 1081, 1083 [2d Dept 2021], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]) or proffer evidence which flatly contradicts the legal conclusions and factual claims contained in the complaint (*see id.*; *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]). The standard of proof for Plaintiff's motion for summary judgment dismissing lienors' counterclaims and the branches of the cross-motions by Gilbane, PNA, S&E and USCR for partial summary judgment subordinating Plaintiff's mortgages to the mechanic's liens was recounted supra.

Pursuant to Lien Law §3, "[a] contractor . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor . . . shall have a lien for the principal and interest, of the value, or the agreed price, of such labor . . . or materials upon the real property improved". Typically, a mechanic's lien filed after a recorded mortgage does not have priority (*see* Lien Law §13[4]). However, excepted from this general rule is a qualifying "building loan mortgage" made pursuant to a "building loan contract" which is not filed in accordance with Lien Law §22. That section provides, in pertinent part, that:

> A building loan contract either with or without the sale of land, and any modification thereof, must be in writing and duly acknowledged, and must contain a true statement under oath, verified by the borrower, showing the consideration paid, or to be paid, for the loan described therein, and showing all other expenses, if any, incurred, or to be incurred in connection therewith, and the net sum available to the borrower for the improvement, and, on or before the date of recording the building loan mortgage made pursuant thereto, to be filed in the office of the clerk of the county in which any part of the land is situated except that any subsequent modification of any such building loan contract so filed must be filed within ten days after the execution of any such modification.

(Lien Law §22).

A "building loan contract" is defined under Lien Law §2[13] as follows:

> . . . a contract whereby a party thereto, in this chapter termed 'lender,' in consideration of the express promise of an owner to make an improvement upon real property, agrees to make advances to or for the account of such owner to be secured by a mortgage on such real property, whether such advances represent moneys to be loaned or represent moneys to be paid in purchasing from or in selling for such owner bonds or certificates secured by such mortgage upon such real property, providing, however, nothing herein contained shall be deemed to construe as a building loan contract a preliminary application for a building loan made by such owner and accepted by such lender if, pursuant to such application and acceptance, a building loan contract is thereafter entered into between the owner and the lender and filed as provided in section twenty-two of this chapter.

Summarized, "'[a] classic building loan mortgage is characterized, *inter alia*, by (1) a requirement in the loan agreement that the mortgagor construct a building or improvement with the loan and (2) a disbursement of the loan in installments — as the construction progresses — rather than in one lump sum, and is subject to the subordination provisions of Lien Law § 22'" (*Dienst v Paik Constr., Inc.*, 139 AD3d 607, 607- 608 [1st Dept 2016], *quoting Juszak v Lily & Don Holding Corp.*, 224 AD2d 588, 588-589 [2d Dept 1996]). The purpose of these provisions is "to permit contractors on construction projects 'to learn exactly what sum the loan in fact made available to the owner of the real estate for the project'" (*Altshuler Shaham Provident Funds, Ltd. v GML Tower, LLC*, 21 NY3d 352, 363 [2013], *citing Nanuet Natl. Bank v Eckerson Terrace*, 47 NY2d 243, 247 [1979]). If a lender fails to adhere to the requisites of the Lien Law, it may incur the penalty of subordination of its mortgage to a mechanic's lien subsequently filed for materials provided and/or services rendered in connection with the project (*see* Lien Law §22; *Nanuet Natl. Bank v Eckerson Terrace*, supra).

In the present case, it is undisputed that the Building and Project Mortgages were recorded before all the mechanic's liens at issue. Also, Plaintiffs acknowledge that the Building Agreement herein is a "building loan contract". What the parties verily dispute is: [i] whether the Project Agreement is a "building loan contract" under the Lien Law, [ii] whether the Building Agreement and a Lien Law §22 compliant affidavit were filed as required, and [iii] whether the Building Agreement was amended, and if so, was the amendment was properly and timely filed in accordance with the Lien Law.

As to the first issue, there is no "express promise" in the Project Agreement to make "improvements" in consideration for that facility loan. The Project Agreement preamble states it has a contrary purpose. The third "whereas" paragraph states the Project Facility existed "to finance certain costs associated with the 'Project' (as such term is hereinafter defined) other than Costs of Improvements (as such term is hereinafter defined)". The Project Mortgage states its purpose as securing as "payment and performance of all Obligations under the Project Facility Agreement" and under the "Project Facility Documents".

The agreement to finance under the Project Agreement is contained in Article 5.1[b] which provides that "[f]inanciers agree, upon Obligor's compliance with and satisfaction of all conditions precedent to the opening of the Project Facility . . . to reimburse Obligor for a portion of the costs incurred by Obligor in connection with the development of the Project and the Construction, to the

extent provided for in the Project Facility Budget", which is defined as "a budget for the portion of the costs relating to the Project which are not or may not constitute Costs of Improvements of the Project" (Project Agreement, Article 2, incorporating definitions in the Building Agreement). Thus, excluded from the Project Agreement are costs associated with "demolition, erection, alteration or repair of any structure" performed by a "contractor, an architect, engineer or surveyor, a subcontractor, laborer and materialman" (Lien Law §2[4] and [5], incorporated by reference into the definitions of "Costs of Improvement" in the Building Agreement). Further, none of the Project Facility Costs incurred by Borrower included expenses which are reflected in the definition of "Costs of Improvement"[4].

Additional proof that the Project Agreement was not intended to be a building loan contract is evident from what was purposefully omitted from that agreement as compared to the Building Agreement. The Project Agreement incorporates "by reference, *mutatis mutandis*," Articles 3-4 and 10 – 22 from the Building Agreement. Article 5.2, which defines the "Facility Documents" under the Project Agreement, which Borrower must provide prior to closing, also appears to be to be a copy of the same enumerated section in the Building Agreement, but with two notable exceptions. Subsection "l" regarding paper required for construction payouts and subsection "m" necessitating a "Section 22 Lien Law Affidavit", are "Intentionally Deleted" from the Project Agreement. The Project Agreement, when viewed in its entirety, does not demonstrate that it "is an agreement by which one undertakes to advance to another money to be used *primarily* in the erection of a building" (*York Mortg. Corp. v Clotar Const. Corp.*, 254 NY 128, 137 [1930][emphasis added]; *see also Generations Bank v Donnelly*, 191 AD3d 1318, 1320 [4th Dept 2021]; *Pawling Sav. Bank v Jeff Hunt Props.*, 225 AD2d 678, 679 [2d Dept 1996]; *Amsterdam Sav. Bank v Terra Domus Corp.*, 97 AD2d 41 [3d Dept 1983]).

The lienors' assertions that Project Agreement "was part of a larger transaction, in which the Borrowers promised to make improvements to the property, does not raise a genuine issue of fact" on this issue (*Natixis, N.Y. Branch v 20 TSQ Lessee LLC*, ____Misc3d____, 2021 NY Slip Op 50249[U][Sup Ct NY Cty, 2021]). Ordinarily, "all contemporaneous instruments between the same parties relating to the same subject matter are to be read together and interpreted as forming part of one and the same transaction" (*see TBS Enters. v Grobe*, 114 AD2d 445, 446 [1st Dept 1985] [internal quotation marks and citation omitted]). Nonetheless, where, as here, the Project and Building Agreements serve different purposes, and with the documents evidencing manifestly distinct terms, reading these agreements as a unitary building loan agreement is not supported (*see Applehead Pictures LLC v Perelman*, 80 AD3d 181, 188-189 [1st Dept 2010]).

As to the Mezzanine Agreement, Gilbane's assertion that the funds under that contract were required to be included in the Lien Law affidavit as it was an "integral part" of the Building Agreement is inapposite. The Mezzanine Agreement, which established the funding for the 45 Park Place Project, was not a building loan contract as it was not secured by a mortgage (Lien Law §2[13]) and it limits application of its funds thereunder to the 45 Park Place Project. Section 9.18 of the Mezzanine Agreement provides that its funds "shall be used to pay for the Construction of the Project". Under Section 1.1, "Project" is defined as "the Real Property, together with (i) all buildings, structures and Improvements located or to be located thereon". Real Property is defined as contained in the "Recitals" which states it is "45 Park Place, City of New York, County of New York, State of New York, (the "Real Property")". That section also provides as follows:

[4] Gilbane annexed to its moving papers as Exhibit "O", a charting of Project budget line items it obtained from Borrower (NYSCEF Doc No 430).

> Neither Buyer nor any other Obligor Party shall (a) apply any portion of the [Mezzanine Agreement] proceeds for any purposes other than those approved by Seller in writing, (b) apply any portion of the [Building Agreement] proceeds for any purposes other than those set forth in the Construction Budget or otherwise approved by [Building Agreement] Party and Seller in writing . . .

Even if the Mezzanine Agreement were a building contract, Gilbane failed to demonstrate *prima facie* that not including its financing as available funds in the Lien Law §22 affidavit for the 43 Park Place Project was a materially false statement requiring subordination of Plaintiff's lien. "The purpose of the subordination penalty is to prevent an *overstatement* of the amounts available to pay contractors which might mislead a contractor to perform work based upon an incorrect view of the available funds" (*see MLF3 Airitan LLC v 2338 Second Ave. Mazal LLC*, 55 Misc. 3d 241, 247-248 [Sup NY Cty 2016][emphasis added]). Gilbane has not explained how this alleged *understatement* of funds available for the 43 Park Place Project would have impacted its decision to provide materials and/or services.

Concerning whether Plaintiff made the requisite filings under Lien Law §22, based on the foregoing determination, only the Building Agreement was subject to the requirements therein. That section mandates that "before or simultaneously with the recording of a building loan mortgage made pursuant to it, must be filed in the clerk's office of the county where land subject to the contract is located, along with a borrower's affidavit stating the consideration paid or to be paid for the loan, any expenses incurred or to be incurred in connection with the loan, and the net sum available for the construction project" (*Altshuler Shaham Provident Funds, Ltd. v GML Tower, LLC*, supra at 362). Contrary to the cross-movant's assertions, Plaintiff tendered proof, attached to Abdullah's affidavit, that the Building Agreement, and an annexed affidavit pursuant to Lien Law §22, were filed with the New York County Clerk's Office on May 25, 2016, almost a month before the Building Mortgage was recorded with the Office of the New York City Register.[5]

The thornier issue concerns whether the documents filed by Plaintiff with the Building Agreement satisfied the Lien Law. The mere fact that a Lien Law §22 affidavit contains inaccurate information does not automatically subject a lender with a prior filed mortgage to subordination. "[T]he disclosure contemplated by the Lien Law is not intended to function as a guarantee that a construction project is adequately financed or economically viable. Nor does the Lien Law impose upon a lender a continuing duty to apprise a contractor of the economic condition of its borrower. Rather, it is intended to provide information for the benefit, inter alia, of contractors, materialmen, laborers, as to the net sum of the building loan available for the project" (*Howard Sav. Bank v Lefcon Partnership*, 209 AD2d 473, 476 [2d Dept 1994]). As a result, the Court of Appeals' interpretation of the statute is that a subordination penalty is only meted out when the lender "knowingly files a materially false statement" (*Nanuet Natl. Bank v Eckerson Terrace*, supra at 248).

On the branches of the cross-motions by PNA, S&E and USCR for partial summary judgment, these parties were required to demonstrate, *prima facie*, that the Lien Law affidavit filed by Plaintiff contained a materially false statement that was knowingly included therein. Conversely, Plaintiff was required to prove, as a matter of law, that its Lien Law affidavit does not contain any materially false statements, and failing this, that any materially false statement was not knowingly made.

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[5] Defendant USCR's argument that the Building Agreement was not filed within ten days of its execution misconstrues Lien Law 22, as that requirement only applies to building loan modifications.

The Lien Law §22 affidavit filed in connection with the Building Agreement is dated April 26, 2016, and provides as follows with respect to the financing thereunder:

> (3) The amount of the Building Facility (as defined in the Facility Agreement) is: $162,112,896.16.
>
> (4) The portion of the Building Facility to be used to repay existing financing on the property is $33,000,000.00.
>
> (5) The portion of the Buidling [sic] Facility to be used to pay consideration for the Building Facility and the other expenses heretofore incurred or to be incurred in connection with and paid out of the Building Facility are (or are estimated to be) as follows: $3,040,548.13.
>
> (6) The amount, if any, to be advanced from the Building Facility to reimburse the Obligor for costs of the Improvements (as defined in the Facility Agreement) expended by the Obligor prior to the date hereof is $141,218.52.
>
> (7) The estimated amount to be advanced from the Building Facility for indirect costs of the Improvements which may become due and payable after the date hereof and during the construction of the Improvements (such as fees of architects, engineers, taxes, insurance, permits and fees and leasing commissions) is: $17,326,070.48.
>
> (8) The net sum available to the Obligor from the Building Facility to pay contractors, subcontractors, laborers and materialmen for the Improvements is: $108,605,059.03.

The moving papers demonstrate that there are issues of fact as to whether the above figures are materially false statements. Regarding the consideration for the Building Facility, the charting of Project budget line items Gilbane obtained from Borrower (Exhibit "O") states that "Financing Costs" for the Building Facility comprised a "Profit Reserve" of "10,299,041.92" and a "Closing Reserve" of $3,191,205.60 totaling $13,490,250.52. This is over $10,000,000.00 more than stated in section 5 of the Building Agreement affidavit. Even if only the "Closing Reserve" is considered, this is still $150,657.47 more than represented as cost for the loan and significant enough to raise an issue as to its materiality (*see FDIC v Skyhaven Landing Corp.*, 207 AD2d 519, 521 [2d Dept 1994]). USCR notes that the "Notice of Lending", dated May 17, 2016, filed by Plaintiff with the New York County Clerk, contained a representation that Plaintiff stated the following: "Maximum balance of advances outstanding to be permitted by the Lender pursuant to this Notice of Financing: $174,000,000", which is almost $12,000,000.00 more than claimed in the Building Facility affidavit. Relatedly, PNA made a cogent observation in its moving papers regarding calculation of the profit, the substitute for interest in this allegedly Shariah compliant loan. Under Article 6 of the Building Agreement, titled "Purchase Price and Profit", a scheme is designated under Article 6.3 to determine the profit rate. By its calculation, using an amount borrowed of $99,999,999.99[6], the profit rate for the loan is $13,320,000.00, which is approximately $10,000,000.00 more than listed in the Lien Law affidavit.

[6] Obtained from a "Notice of Lending", dated May 17, 2016, filed by Plaintiff with the New York County Clerk.

The documents proffered in support of these arguments, despite not being in admissible form under CPLR §4518, can be considered in opposition to Plaintiffs' motion for summary judgment (*see eg Bishop v Maurer*, 106 AD3d 622 [1st Dept 2013]), but cannot support Defendants cross-motions for summary judgment (*see eg Yassin v Blackman*, 188 AD3d 62 [2d Dept 2020]). Entirely unaddressed in the cross-motions is what admissible proof supports that any of these alleged misstatements were "knowingly" proffered (*see Nanuet Natl. Bank v Eckerson Terrace*, supra).

Gilbane argues, *inter alia*, that the inclusion of the term "estimated" in section seven of the Building Agreement affidavit to describe the amount of the Building Facility costs establishes non-compliance as a matter of law. Gilbane did not cite, and this Court could not find, any appellate authority to support this claim. Nevertheless, given that the Court of Appeals has described the purpose of Lien Law §22 as to assist contractors and the like "to learn *exactly* what sum the loan in fact made available to the owner of the real estate for the project" (*Nanuet Natl. Bank v Eckerson Terrace*, supra at 274 [emphasis added]), its inclusion is, at best, grist for the mill in determining the materiality of any misstatement. Gilbane's assertion that interest is the only consideration for a loan, if proffered as a universal maxim, is incorrect. Fees, expenses, and most commonly points, are routinely expenses of a loan transaction in addition to interest. Moreover, these expenses and closing costs are often folded into the loan thereby paying same out of the borrowed funds. Thus, any claim of failure of consideration is meritless.

Defendant S&E argues, as do Glibane and USCR in less detail, that the entire Islamic Murabaha structure of funding used here renders the net sum available for the project stated in section eight of the Lien Law §22 affidavit false since the Lenders provided Metals to the Borrower, not "funds" or "financial support". S&E also claims that Borrower's resale of the Metals to an unidentified third-party introduced an unknown variable into how much financing would be available. Like Gilbane before, S&E did not proffer any appellate authority to support this claim. Indeed, this Court's research failed to yielded a single opinion from a New York State court related to Islamic Murabahas. Several federal courts have weighed in on this topic, but not in relation to the Lien Law. In one case, *Bahr. Islamic Bank, BisB v Arcapita Bank B.S.C.(C) (In re Arcapita Bank B.S.C.(C))*, 640 BR 604, 624 [SDNY 2022], the District Court observed that the Murabaha contracts in that case did not replicate customary commodities transactions and the risks inherent therein. Rather, the Court noted that the agreements were "loan-like" "liquidity management tools" and that "the murabaha agreements [there] had nothing to do with the underlying commodities themselves, and everything to do with structuring a loan-like or credit-financing agreement, structured so as not to run afoul of Shari'a law's outlawing of interest" (*id.*). Ultimately, the Court held the Murabaha transactions did not constitute "securities" under sections 362[b][6], 556, and 561[a] of the Bankruptcy Code, as they fell "within this exclusion for debts, for they provide for the purchase, and repurchase, of the same commodities, plus an increase" (*id* at 623). This would seem to cast doubt on S&E's assertions in this regard, but the District Court's findings were made on the specific Murabaha contracts therein as well as a thoroughly developed factual background not yet presented here.

With respect to the claimed modifications to the Building and Mezzanine Agreements, despite the legislature's use of the term "any subsequent modification", not every change to a building loan contract requires compliance with the filing requirement of Lien Law §22. This section has "always been interpreted to mean any 'material' subsequent modification" (*Altshuler Shaham Provident Funds, Ltd. v GML Tower, LLC*, supra 365 n 9). "A modification of a building loan agreement is '"material" if it: (1) alters the rights and liabilities otherwise existing between the parties to the agreement or (2) enlarges, restricts or impairs the rights of any third party beneficiary'" (*Howard Sav. Bank v Lefcon*

Partnership, 209 AD2d 473, 475 [2d Dept 1994], *citing HNC Realty Co. v Bay View Towers Apts.*, 64 AD2d 417, 426 [2d Dept 1978]). To constitute an alteration of rights as between the lender and borrower within the meaning of the statute "there must also be some element of impairment of rights of section 22 beneficiaries in order that a modification be so 'material' or 'essential' as to warrant its filing, on penalty of subordination" (*In re Admiral's Walk, Inc.*, 134 BR 105, 121 [Bankr WD NY 1991]).

Gilbane and USCR's assertions that there were material modifications to these agreements is not established as a matter of law. To the extent they rely on the First and Second Amendments to the Mezzanine Agreement, while these are modifications of the Mezzanine Agreement, what is not established, based upon the findings supra, is whether these are material modifications or, more importantly, whether they apply to the Building Agreement, the only indenture established to be a building contract under the Lien Law. Gilbane proffers correspondences from Plaintiff to Borrower dated August 16, 2018, and December 21, 2018, as proof the Building and Mezzanine Agreements were materially modified. Initially, neither document is a fully executed contract. The August 18 letter appears to be, at most, an offer to modify certain terms of the Mezzanine Agreement. The December 21 letter appears to be a "Letter Agreement", but it is unexecuted. An October 22, 2018 "Letter Agreement" was referenced but not submitted.

To the extent the Lienor Defendants are claiming third-party beneficiary status, that claim fails as section 21.6 of the building loan contract expressly provides that:

> Neither Administrative Agent nor Financiers shall be deemed to be in privity of contract with any contractor or provider of services to the Project, nor shall any payment of funds directly to a contractor or subcontractor or provider of services be deemed to create any third-party beneficiary status or recognition of same by Administrative Agent or Financiers.

Such language is consistently interpreted to preclude contractors from claiming third party beneficiary status under Lien Law §22 (*see S&T Bank v Top Capital of N.Y. Brockport, LLC*, 188 AD3d 1634, 1636 [4th Dept 2020]; *Howard Sav. Bank v Lefcon Partnership*, supra).

Accordingly, the first and second branches of Plaintiff's motion to dismiss the counterclaims of Gilbane, PNA, USCR, S&E, Ismael, CRS and Trade Off Plus for lien subordination and mechanic's lien foreclosure are denied. Likewise, the branches of the cross-motions by PNA, S&E and USCR for summary judgment on its counterclaims of lien subordination and foreclosure are denied.

Gilbane seeks leave to extensively amend its answer to [1] add additional factual support to its second, third, seventh and ninth affirmative defenses, [2] require an answer to all its cross-claims, both proposed and existing, pursuant to CPLR §3011, [3] plead a new crossclaim, numbered sixth, as against Park Place Development Primary LLC, Park Place Partners Development LLC, SoHo Properties General Partner LLC, and Sharif El Gamal, [4] plead a new cross-claim, to be numbered seventh, against Park Place Development Primary LLC, Park Place Partners Development LLC, SoHo Properties General Partner LLC, and Sharif El Gamal, [5] plead three new counterclaims, to be numbered first, second and fourth and [6] amend its original counterclaim and sixth-crossclaim to be renumbered eighth and third, respectively. Plaintiff and Defendant Borrower oppose this branch of the cross-motion.

Generally, leave to amend a pleading under CPLR §3025[b] is to be freely given "absent prejudice or surprise resulting directly from the delay" (*see eg. O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83 [1st Dept 2017]; *Anoun v City of New York*, 85 AD3d 694 [1st Dept 2011]; *see also*

Fahey v County of Ontario, 44 NY2d 934, 935 [1978]). However, a proposed amendment that plainly lacks merit or is inviable may be denied (*see Park Union Condominium v 910 Union St.*, 196 AD3d 427 [1st Dept 2021]; *Jean-Baptiste v 153 Manhattan Ave. Hous. Dev. Fund Corp.*, 124 AD3d 476 [1st Dept 2015]).

The branch of Gilbane's cross-motion to add factual support to certain affirmative defenses is granted as to the second and third only. As to the seventh affirmative defense, the elements of a defense of equitable estoppel in a mortgage foreclosure action is pled "with respect to the party estopped, '(1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position'" (*First Union Nat'l Bank v Tecklenburg*, 2 AD3d 575, 577 [2d Dept 2003], *citing Airco Alloys Div., Airco, Inc. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 81-82 [4th Dept 1980]). The proposed amended answer lacks an allegation that Plaintiffs' alleged failure to update Gilbane as to Borrower's defaults was done intentionally. Additionally, the affidavit of Robert P. Van Akin ("Van Akin"), a former Vice-President of Gilbane, shows awareness of Borrower's questionable financial condition before Plaintiff issued default notices to Borrower in May, August and December 2018. Van Akin averred that payments to Gilbane from Borrower began to slow in "mid-2018" and that Plaintiff began paying Gilbane directly as early as October 2018. Thus, justifiable reliance is absent, and this proposed affirmative defense is insufficiently pled (*see Town of Hempstead v Inc. Vill. of Freeport*, 15 AD3d 567 [2d Dept 2005]).

The proposed amendments to the ninth affirmative defense, unclean hands, simply incorporate those proposed in the seventh by reference. A party alleging unclean hands must establish that the party charged is "guilty of immoral or unconscionable conduct directly related to the subject matter" (*Citibank, N.A. v American Banana Co, Inc.*, 50 AD3d 593, 594 [1st Dept 2008]), to wit the default in repayment (*see PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 1112 [3d Dept 2013]). The allegations contained in the amended answer and Van Akin's affidavit do not reach this standard.

The proposed amendment to require an answer to the existing crossclaims pursuant to CPLR §3011 is denied. All these claims and allegations were denied by rule (*see Green Point Sav. Bank v Pagano*, 103 AD2d 735 [2d Dept 1984]) and there is no indication that after the passage of two years an answer thereto would be expected to say something new or revealing.

Gilbane also seeks to plead fraudulent inducement as a crossclaim as well as Debtor and Creditor Law §276 as a crossclaim and counterclaim. Briefly, the proposed fraudulent inducement crossclaims allege that Defendants Borrower, Museum Owner, SoHo Properties General Partner LLC, and Sharif El Gamal made false statements and/or omissions designed to induce Gilbane to enter into a construction management agreement with Museum Owner, title holder of Lot 8 at the time, and a later amendment of the CMA to substitute Borrower soon after it took title to Lot 8. Under the Debtor and Creditor Law §276 claim, Gilbane seeks to have all transfers of funds from Borrower to Museum Owner, Properties General Partner LLC, Sharif El Gamal, and Plaintiff voided to the extent necessary to satisfy Gilbane's mechanic's liens.

A claim of fraud must allege "the circumstances constituting the wrong…in detail" (CPLR §3016 [b]). The elements to be pleaded are "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury"

(*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005]). A claim is sufficiently pleaded when the alleged facts are "sufficient to permit a reasonable inference of the alleged misconduct" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008] [internal quotation marks omitted]). The claim must "be pleaded in sufficient detail to give adequate notice," but plaintiffs "need not...establish the truth of their allegations," rather they "need only allege specific facts from which it is possible to infer defendant's knowledge of the falsity of its statements" (*Oster v Kirschner*, 77 AD3d 51, 58 [1st Dept 2010] [internal quotation marks and citation omitted]). A plaintiff must "'set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud'" (*Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005], quoting *Handel v Bruder*, 209 AD2d 282, 282-283 [1st Dept 1994]).

"To state a cause of action for fraudulent inducement, it is sufficient that the claim alleges a material representation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequentially sustaining a detriment" (*Merrill Lynch v Wise Metals Group, LLC.*, 19 AD3d 273, 275 [1st Dept 2005]). A "cause of action for fraud arising out of a contractual relationship may be maintained only where the plaintiff alleges a breach of duty separate from, or in addition to, a breach of the contract" (*Levine v American Intern. Group*, 16 AD3d 250 [1st Dept 2005]). Therefore, "the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract, and not merely a misrepresented intent to perform" (*Hawthorne Group LLC v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004]).

Under the facts as pled, it cannot be concluded that Gilbane does not have a claim as a matter of law. Nevertheless, as proposed, the crossclaim is insufficiently pled. Missing is specificity as to which Defendants made each of the various alleged misrepresentations (*see RKA Film Fin., LLC v Kavanaugh*, 171 AD3d 678 [1st Dept 2019]) as well as details verifying the statements were made before the CMA was executed (*see MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286 [1st Dept 2016]). The first alleged misrepresentation concerning a "secret agreement" between Borrower and Museum Owner is, as alleged by Gilbane, a "covert" omission. Unlike an active misrepresentation of fact, a duty to disclose information is a requirement of a fiduciary relationship, not an arm's length transaction like the CMA (*see East 15360 Corp. v Provident Loan Soc.*, 177 AD2d 280 [1st Dept 1991]). Here, there are no facts pled, particularly as to Museum Owner, demonstrating a duty to disclose the existence of this "secret agreement" (*cf. Valiotis v Bekas*, 106 AD3d 992, 993 [1st Dept 2013]).

Defendant Museum Owner's assertion that this claim is barred by the statute of limitations is not established. A party relying on the statute of limitations has the burden to establish when the claim accrued and that the applicable period for commencement of an action has expired (*see generally Wilmington Sav. Fund Socy., FSB v Alam*, 186 AD3d 1464 [2d Dept 2020]; *Benn v Benn*, 82 AD3d 548 [1st Dept 2011]). For a fraud claim, the period is "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it" (CPLR §213[8]). Although Museum Owner noted that the motion to amend was brought more than six-years after the CMA was executed, unaddressed was the later executed amendment as well as the issue of discovery of the fraud.

Like fraud, a Debtor and Creditor Law §276 claim must be pleaded with the specificity required by CPLR §3016[b] (*see Avilon Auto. Group v Leontiev*, 194 AD3d 537, 539 [1st Dept 2021]). Gilbane's proposed crossclaim and counterclaim based on this statute is insufficient on its face as all the

allegations, including the "badges of fraud", are based only on "information and belief" (*Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]).

Gilbane seeks to add a claim of tortious interference with contract against Plaintiff as a counterclaim. "Under New York law, to sustain a claim of tortious interference with prospective economic advantage, a plaintiff must prove (1) the existence of a valid contract between plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procuring of the breach of that contract; and (4) damages" (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]). "Specifically, the plaintiff must allege that the contract would not have been breached 'but for' the defendant's conduct" (*Washington Ave. Assocs. v Euclid Equip.*, 229 AD2d 486, 487 [2d Dept 1996]). Here, the proposed cause of action is insufficient as vague and conclusory (*see Ruha v Guior*, 277 AD2d 116 [1st Dept 2000]). It fails to plead how Plaintiff's actions were designed to bring about a breach of the CMA, as opposed to just being negligent or incidental to some other lawful purpose (*see Alvord & Swift v Stewart M. Muller Constr. Co., Inc.*, 46 NY2d 276, 281 [1978]).

Gilbane's proposed fourth counterclaim, for equitable subordination, seeks the same relief as it is afforded under the Lien Law. Further, the purpose of equitable subordination is "to compel the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay it" (*Laventall v Pomerantz*, 263 NY 110 [1933]). In this context, the law recognizes the owner of the property, not the mortgagee, as the responsible party under this doctrine (*see Korea Commer. Bank v Ianos*, 236 AD2d 249, 250 [1st Dept 1997]).

The branch of Gilbane's motion to amend its original counterclaim and sixth crossclaim to reflect its alleged receipt by assignment of the mechanic's liens of Defendants Transcontinental, The Pace Companies New York, Inc., Peak Mechanical Solutions, Inc., Men of Steel and Gotham Drywall, Inc. is granted without opposition.

As to the branch of the motion to dismiss the other 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]).

All the affirmative defenses founded in the Lien Law are presently viable based upon the foregoing determinations.

The affirmative defenses which are directed to the legal sufficiency of Plaintiff's complaint are unnecessary 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 affirmative defenses claiming estoppel, unclean hands, release and waiver are entirely conclusory and unsupported by any facts in the answer. 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 affirmative defenses that, in one form or another, allege breach of contract by Plaintiff, in addition to being conclusory and totally devoid of any supporting facts (*see Countrywide Home Loans Servicing, L.P. v Vorobyov,* supra), fail to allege how any acts by Plaintiff constitute excuses to a default in payment under the mortgage note.

The affirmative defenses of mitigation are unavailing in a foreclosure action (*see Marine Midland Bank, N. A. v Virginia Woods Ltd.*, 201 AD2d 625 [2d Dept 1994]) as the amount due is not a defense to summary judgment and can be raised even by a defaulting mortgagor (*see eg Excel Capital Group Corp. v 225 Ross St. Realty, Inc.*, 165 AD3d 1233 [2d Dept 2018]).

The affirmative defenses of culpable conduct or that Plaintiff caused or contributed to its own damages are 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]).

The affirmative defense pled by CRS and Trade-Off which alleges statute of limitations fails. Plaintiff established that it timely commenced this action with the affidavits and documents submitted in support of its motion which demonstrated Plaintiff 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.

Any other affirmative defenses raised by the Defendants which were unaddressed by Defendants in their opposition 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]).

The branch of Plaintiffs' 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 Plaintiffs' motion to sever the counterclaims and third-party claims is denied as, at present, it cannot be concluded that these causes of action are wholly dissimilar and separable from the foreclosure action (*cf. Valley Sav. Bank v Rose*, 228 AD2d 666 [2d Dept 1997]).

The branch of the motion to discontinue the action against Defendant Peri Formwork Systems, Inc. pursuant to CPLR §3217[b] is granted without opposition.

The branch of Plaintiffs' motion to amend the caption 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 the branch of Plaintiffs' motion for summary judgment on its cause of action for foreclosure, for the appointment of a referee and to sever the counterclaims is denied, and it is

ORDERED that the branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted, and it is

ORDERED that all the affirmative defenses in the Defendants' answers, except those related to the Lien Law, are dismissed, and it is

ORDERED that the branch of Gilbane's cross-motion to amend its answer is granted only to the extent that it may plead the proposed amendments to its second and third affirmative defenses as well as those contained in the proposed eighth crossclaim and third counterclaim, and it is

ORDERED that the action is discontinued as against Defendant Peri Formwork Systems, Inc., and it is

ORDERED that defendants John Doe #1 through John Doe #12 are hereby dismissed from this action, and it is

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

MALAYAN BANKING BERHAD, NEW YORK BRANCH, as Administrative Agent for MALAYAN BANKING BERHAD, LONDON BRANCH, WARBA BANK K.S.C.P., and 45 PARK PLACE INVESTMENTS, LLC,

Plaintiff, Index No. 850083/2020

-against-

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., TRANSCONTINENTAL STEEL CORP., ISMAEL LEYVA ARCHITECT, P.C., ULE GROUP CORP. D/B/ A UNITED LIGHTING ELECTRICAL CORP., S&E BRIDGE & SCAFFOLD LLC, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK

STATE DEPARTMENT OF TAXATION AND FINANCE,

Defendants.
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This matter is set down for a status conference on **February 24, 2022 @ 2:15 pm** in Courtroom 1127[b] of the Courthouse located at 111 Centre Street.

11/18/2022
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	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE