Alma Mgt. PTE Ltd v Shepard Towers LLC
2022 NY Slip Op 34036(U)
November 14, 2022
Supreme Court, Kings County
Docket Number: Index No. 532071/21
Judge: Lawrence Knipel
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At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of November, 2022.

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

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ALMA MANAGEMENT PTE LTD, SWISSPATH CONSULTING AG,

Plaintiffs,

- against - Index No. 532071/21

SHEPARD TOWERS LLC; QUANTA FINANCE LLC; MCKARKEIN INVESTMENT IDF LLC, MCKARKEIN CAPITAL LLC; JACOB HERBST; NAOMI MAUER; ZEV SCHWARTZ; EITAN BINET; MEYER DEUTSCH; PEYOM LHR; ROBERT TIMSIT; FRANK SARFATI; GENEVA INTERNATIONAL INSURANCE INC; "JOHN DOE #1 through "JOHN DOE #100,"

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	38-52 81-89
Opposing Affidavits (Affirmations)	61-75 104-116

Upon the foregoing papers in this action regarding an alleged real estate "scam," defendants Shepard Towers LLC (Shepard Towers), McKarkein Investment IDF LLC (McMarkein IDF), McKarkein Capital LLC (McKarkein Capital) and Meyer Deutsch (Deutsch) move (in motion sequence [mot. seq.] one) for an order: (1) dismissing the amended complaint, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (7) and 3016 (b) (as to the

ninth cause of action for fraud); or, alternatively, (2) compelling arbitration, pursuant to CPLR 7503 (a); and (3) awarding costs and sanctions for frivolous conduct, pursuant to 22 NYCRR § 130-1.1 (Part 130).

Defendant Quanta Finance LLC (Quanta) moves (mot. seq. three) for an order: (1) dismissing the amended complaint, pursuant to CPLR 3211 (a) (1) and (a) (7); (2) canceling the December 15, 2021 amended notice of pendency; and (3) awarding costs and sanctions, pursuant to Part 130.

Background

On December 15, 2021, plaintiff Alma Management PTE Ltd. (Alma), a Singapore company, commenced this fraud action regarding an alleged real estate "scam." On December 20, 2021, Swisspath Consulting AG (Swisspath), a Zurich company, joined Alma in this action, and plaintiffs filed an amended summons, amended complaint and an amended notice of pendency against the real property at 341 Shepard Avenue in Brooklyn (Block 3989, Lot 7) (Property) (NYSCEF Doc Nos. 4-6). Paragraphs 1 through 4 of the amended complaint describe this action as follows:

> "This is a case of real estate fraud where Plaintiffs are two of many unsuspecting foreign entities ripped off by a sophisticated real estate enterprise. In essence, the scam worked as follows: (1) Plaintiff, ALMA . . . was approached by defendant ROBERT TIMSIT [Timsit], a partner of defendant ZEV SCHWARTZ [Schwartz], who told ALMA about his role at PEYOM LHR [Peyom] and his role as equity partner at MCKARKEIN INVESTMENT . . .; (2) ALMA was asked to fund a loan to a real estate developer, later discovered to be SHEPARD TOWERS . . . in exchange for a note and mortgage . . . secured by the [P]roperty . . .; (3) One-million

two hundred seventy-five thousand dollars ($1,275,000.00) was sent pursuant to the agreements by the Plaintiffs on October 22, 2019; (4) a UCC Financing Statement was filed on May 19, 2020 a few days after ALMA asked PEYOM about why an interest payment had not been made; (5) Defendant SHEPARD TOWERS . . . defaulted on the loan from Plaintiffs and refuses to repay the Loan.

"After receiving the loan proceeds from Plaintiffs, Defendant SHEPARD TOWERS . . . and EITAN BINET [Binet], as signatory, obtained a loan from Bayport Funding LLC in the amount of five-hundred fifty thousand dollars ($550,000.00) and recorded a mortgage against the Property . . . Then, on July 27, 2021, under . . . SCHWARTZ's direction, the Property was re-financed through QUANTA . . . as lender, for two-hundred fifty-thousand dollars ($250,000.00). Pursuant to the land records for Kings County, the [consolidated] mortgage was assigned to QUANTA . . .

"By this Complaint, Plaintiffs seek relief from this Court in several manners. Plaintiffs seek repayment of its loan plus interest, costs and fees. Plaintiffs seek an equitable mortgage [against the Property] in a position prior to QUANTA . . . since they were on notice of Plaintiffs' interest in the Property by virtue of the UCC Financing Statement. Plaintiffs also seek a constructive trust to secure the money it loaned to SHEPARD TOWERS . . . and its members, JACOB HERBST [Herbst]; NAOMI MAUER [Mauer]; . . . SCHWARTZ; . . . BINET [and] DEUTSCH.

"In addition, Plaintiffs seek a judgment under the theories of unjust enrichment, breach of contract, fraud, violations of the federal Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1961, et seq.; accounting, attachment, promissory estoppel, conversion, money had and received, negligence, breach of fiduciary duty, and foreclosure to recover money and damages fraudulently and unjustly obtained by the Defendants through their real estate scam" (NYSCEF Doc No. 4, amended complaint at ¶¶ 1-4).

The amended complaint asserts the following 18 causes of action: (1) a judgment declaring that Alma and Swisspath are third-party beneficiaries of Peyom's May 19, 2020 UCC Financing Statement (UCC Financing Statement) since "SHEPARD TOWERS and Defendant PEYOM intended that Plaintiffs receive a benefit in the form of interest as payment for the Plaintiffs' Loan" and defendants allegedly knew that plaintiffs were funding the loan to Shepard Towers; (2) a judgment declaring that plaintiffs are holders of Peyom's UCC Financing Statement as "assignees"; (3) a judgment declaring that plaintiffs have a first position equitable mortgage against the Property; (4) attachment; (5) a constructive trust in favor of plaintiffs; (6) unjust enrichment; (7) breach of contract as against Peyom, a Luxembourg company; (8) fraud as against Peyom, Timsit and Sarfati; (9) fraud as against Shepard Towers, Schwartz, McKarkein IDF and McKarkein Capital; (10) an accounting; (11) promissory estoppel; (12) conversion as against Peyom, Timsit and Sarfati; (13) conversion as against Schwartz, Deutsch, Binet, Herbst, Mauer, Geneva International Insurance Inc. (Geneva) and Shepard Towers; (14) money had and received; (15) negligence as against Peyom; (16) breach of fiduciary duty as against Peyom; (17) a judgment declaring that plaintiffs' equitable mortgage has priority over Quanta's consolidated mortgage recorded against the Property; and (18) foreclosure of plaintiffs' equitable mortgage.

The amended complaint has the following four exhibits: (A) a document identified as a "presentation" by Peyom; (B) collectively, an October 25, 2019 Credit Facility Agreement between Peyom as "Lender" and Shepard Towers as "Borrower" with a April

25, 2021 maturity date (and Schedules 1 through 4)[1] (Peyom Credit Facility Agreement) and an October 25, 2019 "Peyom Drawdown Prospectus – Final Terms" (collectively, the Peyom Agreements);[2] (C) a McKarkein Capital presentation entitled "Multi Family Property Acquisitions in New York/New Jersey"; and (D) McKarkein IDF's UCC Financing Statement (*see* NYSCEF Doc Nos. 7-10).

On March 30, 2022, defendants Shepard Towers, McKarkein Capital, McKarkein IDF, and Deutsch collectively answered the amended complaint and denied the material allegations therein "except admit[ ] upon information and belief that neither a note or a mortgage on behalf of Plaintiffs [was ever] signed by any of the Defendants and that Defendant, Eitan Binet, obtained a loan from Bayport Funding LLC" and "that defendant . . . Deutsch is the manager of McKarkein . . . IDF and Shepard Towers . . . (NYSCEF Doc No. 33 at ¶¶ 1 and 4). Defendants also asserted affirmative defenses, including that "this Court lacks subject matter jurisdiction . . . as Plaintiffs' claims are based upon alleged Peyom Agreements with Peyom LHR that *by their express terms call for mandatory arbitration of any and all disputes in Luxembourg*, Grand Duchy of Luxembourg . . ." (*see id.* at ¶ 50 [emphasis added]). Defendants also asserted cross claims against Peyom and Timsit for indemnification and/or contribution (*id.* at ¶ 58).

[1] Schedule 1 is the "Security Interest," Schedule 2 is the "Notes," Schedule 3 is the "Promissory Note" and Schedule 4 is "Payment Accounts" (*see* NYSEF Doc No. 8 at 19-36).
[2] While a Subscription Agreement was also referenced as part of Exhibit B to the amended complaint (NYSCEF Doc No. 8), the Subscription Agreement was accidentally omitted. To date, the record has not been corrected to include the Subscription Agreement.

Defendants' Instant Motion

On May 18, 2022, defendants Shepard Towers, McKarkein IDF, McKarkein Capital and Deutsch collectively moved to dismiss the amended complaint, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (7) and 3016 (b) (regarding the ninth claim for fraud), or alternatively, compelling arbitration in Luxembourg, pursuant to CPLR 7503 (a) and imposing Part 130 sanctions.

Defense counsel argues that "[d]efendants possess[] valid defenses based upon documentary evidence that the Complaint may not be maintained in this Court because Plaintiffs' legal agreements as alleged in the Complaint, were made with defendant Peyom . . . and not with Answering Defendants, and those agreements have valid and enforceable arbitration provisions" (NYSCEF Doc No. 39 at ¶ 16). Specifically, defendants rely on the arbitration provisions in the Peyom Credit Facility Agreement (annexed to the amended complaint as Exhibit B [*see* NYSCEF Doc Nos. 8 and 41]) and the Subscription Agreement, which is referenced but was accidentally omitted from the record and the moving papers.

Defendants also argue that they are entitled to an order: (1) dismissing the complaint, pursuant to CPLR 3211 (a) (1), based on documentary evidence because "Plaintiffs' legal agreements, if any, as alleged in the Complaint, were made with defendant Peyom . . . defendant Robert Timsit, and not with Moving Defendants . . ."; (2) dismissing the complaint, pursuant to CPLR 3211 (a) (3), based on plaintiffs' lack of both capacity and standing because plaintiffs are foreign corporations and the complaint is based entirely

on the Peyom Agreements; and (3) dismissing the fraud claim for lack of specificity; or, alternatively, (4) compelling arbitration of plaintiffs' claims in accordance with the mandatory arbitration provisions in the Peyom Agreements.

Defendants contend that "by admission, all of the allegations in the Complaint derive from, and must be construed under, the Peyom Agreements that Plaintiffs are claiming to be beneficiaries under" and that both the Subscription Agreement and the Credit Facility Agreement specifically require that *any disputes* arising out of the loan or Agreement must be resolved by arbitration in Luxembourg (NYSCEF Doc No. 53 at 4-5). Defendants further argue that "by citing to the Peyom Agreements and making them part of their Complaint, Plaintiffs effectively ratified the broad arbitration clauses that contain a valid choice of forum, a Luxembourg arbitration" (*id.* at 14).

Plaintiffs' Opposition

Plaintiffs, in opposition, submit an affirmation from Raphael Ohana (Ohana), Alma's Director, CEO and 100% shareholder (*see* NYSCEF Doc No. 73 at ¶ 1). Ohana affirms that he personally reviewed Alma's business records, including those records "associated" with the Property and affirms that "Peyom . . . via Robert Timsit . . . solicits investors and other lenders such as Alma to raise capital for properties being developed by McKarkein Capital . . . in New York and New Jersey in exchange for secured interests in properties" (*id.* at ¶¶ 5-6). Ohana explains that "[i]n 2019, I was approached by and met with Timsit multiple times" who "explained that he was business partners with Zev Schwartz . . . and by way of Timsit's securitization company (Peyom) in Luxembourg, they

were raising money to fund a loan [for] real estate development projects in New York and New Jersey" (*id.* at ¶ 7). Ohana avers that "[o]n October 22, 2019, Alma wired $1,275,000.00 (the 'Loan') to the real-estate developer, later discovered to be Shepard Towers, in exchange for a note and mortgage or a UCC Financing Statement, pursuant to the Credit Facility Agreement between the parties" (*id.* at ¶ 9).

According to Ohana, "[p]ursuant to the Term Sheet between the parties, the note and mortgage or UCC Financing Statement was to be drafted in favor of Peyom, as trustee, for the benefit of the lender (Alma), and was to be recorded by Shepard Towers upon receipt of the Loan" (*id.* at ¶10), however, "[n]o mortgage and note, or UCC Financing Statement, was ever executed by the defendants, as agreed . . ." (*id.* at ¶ 11). Ohana asserts that "[o]n October 28, 2019, Shepard [Towera] purchased the Subject Property for $1,323,850.00" (*id.* at ¶ 12). Ohana affirms that "[o]n May 19, 2020, seven months after Alma wired the Loan, and only after Alma inquired into the missing mortgage or UCC Financing Statement; a UCC Financing Statement was filed by Peyom reflecting the Loan from Alma as file number 202005198207148" "[h]owever, the UCC Financing Statement incorrectly identifies 'Peyom' as the secured party's name, in violation of the agreement between the parties that the secured party to the instrument be designated as 'Peyom, as trustee, for the benefit of lender'" (*id.* at ¶ 16). Ohana alleges, upon information and belief, that "defendants knew that a mortgage and note or UCC Financing Statement would not be executed in the way the parties agreed" and asserts that "defendants only filed a UCC

Financing Statement (albeit, to the incorrect secured party) after Alma questioned whether Peyom was cooperating per the agreement" (*id.* at ¶ 19).

Plaintiffs also submitted an attorney affirmation arguing that "Plaintiffs have both standing and capacity to commence this action as individual investors and the intended third-party beneficiaries under the UCC [Financing] Statements who extended the Loan used to purchase and develop the Subject Property" (*see* NYSCEF Doc No. 61 at ¶ 3). Plaintiffs' counsel further argues that the amended complaint "adequately pleads a claim for fraud against the Moving Defendants, and this fraud begs the question of the validity of the Peyom Documents, which would render the arbitration provisions unenforceable" (*id.*).

Defendant Quanta's Dismissal Motion

On August 1, 2022, defendant Quanta, the holder of an $800,000.00 consolidated mortgage encumbering the Property, which was allegedly recorded with the City Register's office on August 30, 2021 (*see* NYSCEF Doc No. 4, amended complaint at ¶¶ 30-32), moved to dismiss the amended complaint, pursuant to CPLR 3211 (a) (1) and (a) (7), cancel the notice of pendency filed against the Property and for Part 130 sanctions.

Quanta contends that the 17th cause of action (the only claim asserted against it) for a declaration that plaintiffs' equitable mortgage has priority over Quanta's $800,000.00 consolidated mortgage encumbering the Property is subject to dismissal under CPLR 3211 (a) (1) and (a) (7) (NYSCEF Doc No. 90 at 1). In this regard, Quanta argues that:

> "Plaintiffs appear to assert that, although they do not hold either a recorded or even an unrecorded mortgage against [the Property], Plaintiffs somehow possess an 'equitable mortgage' against the Property that gives them a prioritized position ahead of Quanta's recorded mortgage lien. But this assertion is unfounded. As the Complaint concedes, the only documentation remotely suggesting any alleged ownership in the Property by Plaintiffs is a UCC financing statement. Compl. ¶¶ 29, 48; *see also* Compl. Exhibit D.
>
> "But as a matter of black letter New York law, a UCC financing statement does not create an ownership interest in real property. Thus, Plaintiffs cannot (and do not) have any interest in the Property. To the extent the UCC financing statement creates any interest for Plaintiffs at all, it could only be in personal property (i.e., fixtures and equipment) located at the Property. Quanta, by contrast, has a properly executed and recorded mortgage on the Property, as evidenced by the online records . . . A search of ACRIS's property records shows no reference to any real property interest owned by Plaintiffs against the block and lot of the Property" (*id.* at 1-2).

In short, Quanta argues that "[i]t is simply preposterous to claim that a UCC filing statement can have priority over a recorded mortgage as Plaintiffs assert here" (*id.* at 2).

Plaintiffs' Opposition

Plaintiffs, in opposition, submit an attorney affirmation arguing that "there are questions of fact at this time regarding whether Quanta had knowledge of Plaintiffs' interest in the . . . property [based on] a UCC Financing Statement filed in the New York State Department . . . by Peyom . . . in May of 2020, prior to the origination of Quanta's loan" (NYSCEF Doc No. 104 at ¶ 3). Importantly, plaintiffs' counsel explicitly admits that "[t]he Loan was intended to be secured by a mortgage over the Property; however,

Plaintiffs were the victims of a fraudulent real-estate scam carried out by several defendants named in this action, and *no mortgage was ever executed*" (*id.* [emphasis added]).

Discussion

"Arbitration is favored in New York State as a means of resolving disputes, and courts should interfere as little as possible with agreements to arbitrate" (*Shah v Monpat Const., Inc.*, 65 AD3d 541, 543 [2009]; *Ferarro v E. Coast Dormer, Inc.*, 2022 WL 6846570, *1 [App. Div. Oct. 12, 2022] [same]). "However, 'by agreeing to arbitrate a party waives in large part many of his [or her] normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent'" (*id.* [quoting *Matter of Marlene Indus. Corp.*, 45 NY2d 327, 333-334 (1978)]). "Thus, a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent 'evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes" and the agreement must be clear and explicit (*id.* [quoting *Matter of Waldron*, 61 NY2d 181, 183-184 (1984)]).

Significantly, while nonsignatories, like plaintiffs Alma and Swisspath, are generally not subject to arbitration agreements, the Second Department has held that nonsignatories may be compelled to arbitrate where they knowingly seek to exploit the benefits of an agreement containing an arbitration clause (*see Matter of Long Island Power Authority Hurricane Sandy Litigation*, 165 AD3d 1138, 1141-1142 [2d Dept 2018] [holding that nonsignatories to agreement with arbitration clause should have been

compelled to arbitrate by application of the direct benefits theory of estoppel]).

Here, the amended complaint alleges that plaintiffs Alma and Swisspath are foreign investors who were scammed by defendant Peyom, an investment and securitization company based in Luxembourg, into providing capital for Peyom and defendants' own investments in the development of New York and New Jersey properties (NYSCEF Doc No. 4 at ¶¶ 24-25). The amended complaint alleges that Peyom provided Alma and Swisspath with the Peyom Agreements consisting of the Peyom Credit Facility Agreement, the Subscription Agreement and the Drawdown Prospectus and instructions on how to purchase such securities when it pitched the investment (*id.* at ¶ 25). The amended complaint alleges that on May 19, 2020, Peyom, as the only secured party, filed a UCC Financing Statement "reflecting the loan from Plaintiffs as file number 202005198207148 . . ." and "Plaintiffs have a claim as a third-party beneficiary of the UCC Financing Statement filed by PEYOM" (*id.* at ¶¶ 29 and 35). Plaintiffs argue that the amended complaint (together with the Ohana affirmation) "adequately pleads a claim for fraud against the Moving Defendants, and this fraud begs the question of the validity of the Peyom Documents, which would render the arbitration provisions unenforceable" (*see* NYSCEF Doc No. 61 at ¶ 3).

Paragraphs 15.1, 15.2 and 15.3 of the Peyom Credit Facility Agreement provide that the parties (Peyom as "lender" and Shepard Towers as "borrower") agree to settle any dispute arising out of or in connection with it by binding arbitration under the laws of Luxembourg in Luxembourg:

> "**15.1 Governing Law** This Agreement and any dispute or claim arising out of, or in connection with, it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by, and construed in accordance with, the laws of Luxembourg.
>
> "**15.2 Arbitration** Save as provided for In Clause 15.3 below, *each of the parties hereto irrevocably agrees to settle any dispute arising out of or in connection with this Agreement,* ***including any dispute regarding the existence, scope, validity*** *or termination of this Agreement or this clause by a sole arbitrator in Luxembourg*, in accordance with the rules of arbitration of the London Court of International Arbitration ('LCIA'). The language of the proceedings shall be English and the award shall be in English. The award of the tribunal shall be final and binding for all parties and may be enforced in front of any court having jurisdiction for such enforcement. Luxembourg law shall govern this arbitration agreement. No punitive or exemplary damages may be granted or awarded whether by the arbitrator or otherwise.
>
> "**15.3 Jurisdiction** The parties hereto irrevocably agree that, Lender may, in its sole and absolute discretion, take any legal or other before the courts of Luxembourg or such other jurisdiction where the Borrower has assets or if more convenient for the Lender in terms of enforcement of rights or recovering moneys under the Underlying Transaction Document. This Clause benefits solely to the Lender" (NYSCEF Doc Nos. 8, 41 and 63 at 18 [emphasis added]).

Similarly, the parties agree that the Subscription Agreement provides that:

> "This subscription agreement is governed by and shall be construed in accordance with, Luxembourg law. Any and all dispute[s] arising out of or in connection with or in respect of the Notes, *including any dispute regarding their existence, scope or validity* shall be referred to and finally resolved by arbitration under the LCIA Rules, which rules are deemed to be incorporated by reference into this agreement and: (i) the number of arbitrators shall be one; (ii) the seat, or *legal place of arbitration shall be Luxembourg*; (iii) the language to be

> used in the arbitral proceeding shall be English; and (iv) the governing law of the arbitral proceeding shall be the substantive law of Luxembourg . . ." (emphasis added).

Thus, the Peyom Credit Facility Agreement and the Subscription Agreement, both of which Peyom admittedly provided to plaintiffs prior to their investment, provide for arbitration in Luxembourg of *any dispute* regarding the proposed investment, including the *validity* of the Peyom Agreements.

Plaintiffs Alma and Swisspath contend that they are intended third-party beneficiaries of the UCC Financing Statement because they were the ones who loaned the capital to Shepard Towers, rather than Peyom. Essentially, plaintiffs challenge the validity and enforceability of the Peyom Agreements, which they claim were the product of defendants' fraudulent investment scheme. However, before investing, plaintiffs were admittedly provided with copies of the Peyom Agreements, including the clear and unambiguous arbitration provisions therein requiring arbitration in Luxembourg of any disputes regarding their validity. Importantly, although plaintiffs are nonsignatories under the Peyom Agreements, they are explicitly relying upon the terms of those Agreements to support their claims against defendants, and thus, under these circumstances, plaintiffs should be compelled to arbitrate their claims (*see Matter of Long Island Power Authority Hurricane Sandy Litigation*, 165 AD3d at 1142). Accordingly, that branch of defendants' motion seeking to compel arbitration against defendants in Luxembourg in accordance with the Payom Agreements is granted.

(2)

Quanta's Dismissal Motion

A dismissal motion under CPLR 3211 (a) (7) requires determining whether the plaintiff has stated a cause of action, but "[i]f the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading has a cause of action'" (*Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2010]). Dismissal results only if the movant demonstrates conclusively that the plaintiff has no cause of action, or that "a material fact as claimed by the pleader to be one is not a fact at all" (*id.* at 1182).

"A motion to dismiss made pursuant to CPLR 3211 (a) (1) will fail unless the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 37 [2006]). "In order for evidence submitted in support of a CPLR 3211 (a) (1) motion to qualify as documentary evidence, it must be unambiguous, authentic, and undeniable" (*Feldshteyn v Brighton Beach 2012, LLC*, 153 AD3d 670, 670-671 [2017] [internal quotations omitted]). It has been held that "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, [and] contracts" constitute documentary evidence for CPLR 3211 (a) (1) (*Ralex Servs., Inc. v Sw. Marine & Gen. Ins. Co.*, 155 AD3d 800, 801-802 [2017]).

New York courts have held that UCC financing statements, like the UCC Financing Statement issued here in favor of Peyom, create security interests in personal property, and

do not apply to "the creation or transfer of an interest in or lien on real property" (*Manufacturers & Traders Tr. Co. v Myers*, 38 AD3d 965, 966 [3d Dept. 2007]; *Badillo v Tower Ins. Co. of New York*, 92 NY2d 790, 794 [1999] ["UCC article 9 sets out a comprehensive scheme to regulate security interests in personal property"]. Quanta correctly argues that "[u]nlike Plaintiffs, Quanta has a properly executed mortgage in the Property which was recorded [on] ACRIS . . . at CRFN Nos.: 2020000195963, 2021000342728, 2021000342729, and 2021000342730" (*see* NYSCEF Doc Nos. 83-86). In contrast, the amended complaint explicitly acknowledges that the only evidence of Alma and Swisspath's interest in the Property is the UCC Financing Statement, which lists *neither* of them as a secured party and was only recorded with the New York Secretary of State (NYSCEF Doc No. 8, amended complaint at ¶¶ 29 and 38). Plaintiffs' interest under the UCC Financing Statement, if any, is subordinate to Quanta's consolidated mortgage that was duly recorded against the Property, as a matter of law. However, where a claim is one for a declaratory judgment, "the court should make a declaration, even though the plaintiff is not entitled to the declaration that he seeks," rather than to dismiss the claim (*Hirsch v Lindor Realty Corp.*, 63 NY2d 878, 881 [1984]; *see also Dodson v Town Bd. Of the Town of Rotterdam*, 182 AD3d 109 [2020]). Accordingly, it is hereby

ORDERED that defendants' motion (mot. seq. one) is only granted to the extent that arbitration is compelled, pursuant to CPLR 7503 (a), and in accordance with the terms of the Peyom Credit Facility Agreement "by a sole arbitrator in Luxembourg, in accordance

with the rules of arbitration of the London Court of International Arbitration (LCIA)"; defendants' motion is otherwise denied; and it is further

ORDERED, that defendant Quanta's motion (mot. seq. three) is only granted to the extent that: (1) under the 17th cause of action in the amended complaint, the court declares that plaintiffs do not have an equitable mortgage over the Property with priority over Quanta's $800,000.00 consolidated mortgage that was previously recorded against the Property; and (2) the amended notice of pendency that plaintiffs filed against the Property is hereby canceled and the County Clerk shall act accordingly. Quanta's motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE