Avatar Lenox Ave LLC v Jacqueline Allmond Cuisine, Inc.
2023 NY Slip Op 30827(U)
March 8, 2023
Supreme Court, New York County
Docket Number: Index No. 850182/2020
Judge: Francis A. Kahn III

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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AVATAR LENOX AVE LLC,

Plaintiff,

- v -

JACQUELINE ALLMOND CUISINE, INC.,JACQUELINE ALLMOND, ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK, UNITED STATES OF AMERICA, CITY OF NEW YORK DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JOHN DOE #1 THROUGH JOHN DOE #15, JANE DOE #1 THROUGH JANE DOE #15, ABC CORP. #1 THROUGH #10,

Defendant.

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INDEX NO. 850182/2020

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110

were read on this motion to/for JUDGMENT - FORECLOSURE & SALE.

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

The within action is to foreclose on a mortgage encumbering a parcel of commercial real property located at 333 Lenox Avenue a/k/a 333 Malcom X Boulevard, New York, New York given by Defendant Jacqueline Allmond Cuisine, Inc. ("Cuisine"). The mortgage secures a loan with an original principal amount of $2,100,000.00 which is memorialized by a commercial promissory note. The note and mortgage, both dated August 31, 2018, were given to non-party Avatar Capital Finance, LLC ("Avatar") and were executed by Defendant Jacqueline Allmond ("Allmond"), as President of Cuisine. The parties also executed a "Loan Agreement" and "Building Loan Agreement" which stated, *inter alia*, that $460,000.00 of the loan proceeds was available for improvements to the premises and would be made in accordance with a "Capital Expense Reserve" schedule and a "Budget and Draw Schedule". Concomitantly with these documents, a document titled "Unconditional Guaranty of Payment and Performance" securing the indebtedness was executed by Defendant Allmond.

Plaintiff commenced this action alleging Defendants defaulted in repayment under the note. Defendants Cuisine and Allmond answered jointly and pled *fifty-nine* [59] affirmative defenses, including lack of standing. The final seventeen [17] of the affirmative defenses are also labeled as counterclaims.

Now, Plaintiff moves for *inter alia* summary judgment against Cuisine and Allmond, for a default judgment against the non-appearing parties, striking the affirmative defenses, appointing a referee to compute and to amend the caption. Defendants Cuisine and Allmond oppose the motion.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Defendants' default in repayment (*see eg 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]). Based upon Defendants' affirmative defense, Plaintiff was also required to demonstrate it had standing when this action was commenced (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]).

Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). A plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No particular set of business records must be proffered, as long as the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported with an affidavit from Thomas Roy Hazelrigg IV ("Hazelrigg"), a Manager of Plaintiff and Avatar. Hazelrigg claims his affidavit was made "based upon personal knowledge and business records of Avatar". However, he does not indicate what information is based on personal observation or derived from records (*see 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 Hazelrigg's knowledge is based upon a review of the books and records of Avatar, he failed to lay an appropriate foundation for the admission of any of the proffered documents as business records under CPLR §4518 (*see eg Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1762 [2d Dept 2020]). The records evidencing the note and mortgage and Defendants' default were created by the assignor, not Plaintiff, and Hazelrigg did not demonstrate knowledge of that entity's record keeping practices (*see Berkshire Bank v Fawer*, 187 AD3d 535 [1st Dept 2020]; *IndyMac Fed. Bank, FSB v Vantassell*, 187 AD3d 725 [2d Dept 2020]). At most, Hazelrigg's affidavit demonstrates that he conducted a naked "review of records maintained in the normal course of business [which] does not vest an affiant with personal knowledge" (*JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513, 1517 [2d Dept 2019]).

Accordingly, since none of the evidence proffered to demonstrate the note, mortgage and Defendants' default is in admissible form, Movant failed to establish any of the *prima facie* elements of the cause of action for foreclosure (*see Federal Natl. Mtge. Assn. v* Allanah, 200 AD3d 947 [2d Dept 2021]).

On the issue of standing, in a foreclosure action it is established in one of three ways: [1] direct privity between mortgagor and mortgagee, [2] holder status via physical possession of the note prior to commencement of the action which contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff either on its face or by allonge, and [3] assignment of the note to Plaintiff prior to commencement of the action (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2d Dept 2020]; *Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375 [3d Dept 2015]). As to the latter two circumstances, the note is the dispositive instrument (*Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). In support of the motion, Plaintiff only proffers proof in support in support of the second circumstance.

"Holder status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff" (*Wells Fargo Bank, NA v Ostiguy*, 127 AD3d 1375, 1376 [2d Dept 2015] [citations omitted]). The indorsement must be made either on the face of the note or on an allonge "so firmly affixed thereto as to become a part thereof" (UCC §3-202[2]). Evidence of the nature of the attachment is required (*see One Westbank FSB v Rodriguez*, 161 AD3d

715 [1st Dept 2018]), since not every appendment can satisfy the statutory requisite (*see HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983 [2d Dept 2015][Paperclip not a firm annexation]). "The attachment of a properly endorsed note to the complaint may be sufficient to establish, prima facie, that the plaintiff is the holder of the note at the time of commencement" (*Deutsche Bank Natl. Trust Co. v Webster,* 142 AD3d 636, 638 [2d Dept 2016]; *cf. JPMorgan Chase Bank, N.A. v Grennan*, 175 AD3d 1513 [2d Dept 2019]).

The endorsement at issue was an allonge contained on a separate page which reveals no discernable evidence of firm attachment from a visual inspection. Resultantly, Plaintiff was required, but failed, to establish the allonge was "firmly affixed" to the original note (*see Nationstar Mtge., LLC v Calomarde*, 201 AD3d 940, 942 [2d Dept 2022]; *JPMorgan Chase Bank, N.A. v Grennan*, supra at 1516). The allegations regarding Plaintiff's holder status contained in Hazelrigg's affidavit are conclusory and insufficient (*see Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 524 [1st Dept 2016]; *Deutsche Bank Natl. Trust Co. v Weiss*, 133 AD3d 704, 705 [2d Dept 2015]). Not every attachment can satisfy UCC §3-202[2] and Aviram offered no description of the nature of the attachment (*see HSBC Bank, USA, N.A. v Roumiantseva,* 130 AD3d 983 [2d Dept 2015]; *Slutsky v Blooming Grove Inn,* 147 AD2d 208 [2d Dept 1989]).

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

The first affirmative defense based upon Executive Order 202.8, *et seq.* fails as matter of law. The Executive Orders at issue do not dictate a remedy for a violation (*see United States Bank N.A. v Middle Dam St.,* ____Misc3d____, 2021 NY Slip Op 30686[U][Sup Ct Kings Cty 2021]["Importantly, the aforementioned Executive Orders do not authorize the dismissal of commercial foreclosure actions commenced during the COVID-19 pause period, pursuant to CPLR 3211"]). Analogously, statutes using mandatory terms like "shall" (*see eg* RPAPL §§1303, 1304; RPL §§232-a, 735[1]; VTL §313; GML §50-e) and with remedial purposes have been interpreted to be conditions precedent with a consequence of dismissal of the action for non-compliance (*see First Natl. Bank of Chicago v Silver*, 73 AD3d 162 [2d Dept 2010]). Unlike those edicts, which were enacted through the legislative process and were intended to be more permanent solutions to societal problems[1], the Executive Orders at issue were intended to be temporary in duration. Additionally, certain case law in this state indicates that violation of an Executive Order creates rights for the executive branch of the government to enforce (*see Singer v Bruner--Ritter, Inc.*, 180 Misc 928 [Sup Ct NY Cty 1943], *affd* 266 App Div 953 [1st Dept 1943]; *see also Bradford v Durkee Mar. Prods. Corp.*, 180 Misc 1049 [Sup Ct NY Cty 1943]; *Leahy v Brooklyn Waterfront Term. Corp.*, 272 App Div 781 [2d Dept 1947]).

The second affirmative defense, claiming frustration of performance, "is inapplicable here since the doctrine offers a defense against enforcement of a contract when the reasons for performing the contract cease to exist due to an unforeseeable event which destroys the reasons for performing the contract" (*see Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909 [1st Dept 2011]).

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[1] For example, the Home Equity Theft Prevention Act (RPL §265-a) and its statutory progeny were enacted to serve enduring social policies (RPL §265-a[1][b]["it is the express policy of the state to preserve and guard the precious asset of home equity, and the social as well as the economic value of homeownership"]).

By the third affirmative defense, Defendants assert acceleration of the subject debt is "wrongful because Avatar Capital and/or Plaintiff are responsible for any missed payments and alleged default." Defendants also pled that "Avatar Capital and/or Plaintiff committed numerous breaches of the agreements, laws, and their duties, as described herein." As a rule, a material breach by one party to a contract may excuse another party's performance (*see Grace v Nappa*, 46 NY2d 560, 567 [1979]). Moreover, "[a] promisee who prevents the promisor from being able to perform the promise cannot maintain suit for nonperformance; he discharges the promisor from duty" (*Canterbury Realty & Equip. Corp. v Poughkeepsie Sav. Bank*, 135 AD2d 102, 107 [3d Dept 1988]). Here, Defendants pled in support of this defense that Plaintiff and/or Avatar were responsible for their loan default since a non-party "ConArch received substantial funds in an unknown amount but left construction and improvements unfinished and left the Property in a state of disrepair so that it could not be used for the intended purpose to operate a restaurant. This in tum [sic] caused Defendant JAC to suffer financial losses and interfered with its ability to make loan payments". As pled, this affirmative defense fails since it alleges ConArch caused Defendants' default, not Plaintiff or Avatar (*cf. Amalgamated Bank v Fort Tryon Tower SPE LLC*, ____Misc3d____, 2011 NY Slip Op 33461[U][Sup Ct NY Cty 2011]). As such, this defense is not viable.

The fourth affirmative defense is, at present, viable based upon the determination supra.

The fifth affirmative defense based upon alleged violations of the Real Estate Settlement Procedures Act [12 USC §2601, *et seq.*] fails as that statute is inapplicable to loans for business or commercial purposes (*see* 12 USC §2606[a][1]).

The sixth and thirty-first affirmative defenses allege Plaintiff and/or Avatar waived the right to foreclose by accepting payments made by the Defendants after the alleged date of maturity or date of the alleged default. This defense is not viable based on the non-waiver clause in paragraph 27 of the mortgage, the absence of an allegation that Plaintiff expressly agreed to excuse Defendants' default and a claim that payments were made after April 1, 2020, the claimed default date (*see Apple Bank for Sav. v Ashkenazi Realty*, 232 AD2d 330 [1st Dept 1996]; *see also Heller Fin. v Apple Tree Realty Assocs.*, 238 AD2d 198, 199 [1st Dept 1997]).

The seventh and eighth affirmatives alleging breaches of contract are not valid defenses as the alleged non-performance is separate from Defendants' obligation to repay the borrowed sums (*see German Am. Capital Corp. v Oxley Dev. Co., LLC*, 102 AD3d 408 [1st Dept 2013]). To the extent these defenses claim Plaintiff failed to disburse all sums required under the note, that raises an issue of the amount due which is not a defense to summary judgment.

The ninth, eighteenth and fortieth affirmative defenses claiming Plaintiff and or Avatar breached a fiduciary duty to Defendants is insufficiently pled. "The legal relationship between a borrower and a bank is a contractual one of debtor and creditor and does not create a fiduciary relationship between the bank and its borrower or its guarantors" (*Bank Leumi Trust Co. of N.Y. v Block 3102 Corp.*, 180 AD2d 588, 589 [1st Dept 1992]) and Defendants do not plead how such a relationship existed in an contractual arm's length debtor and creditor relationship (*see Banque Nationale de Paris v 1567 Broadway Ownership Assocs.*, 214 AD2d 359, 360 [1st Dept 1995]). To the extent Defendants posit, via Allmond's affidavit in opposition, that a fiduciary relationship arose from a verbal escrow agreement, that claim fails. Here, Schedule 5.18[b]-1 of the Loan Agreement completely contradicts Defendants' argument that an oral escrow agreement existed (*see Citibank v Plapinger*, 66 NY2d 90, 95- 96 [1985]; *LaBarbera v Marino*, 192 AD2d 697, 698 [2d Dept 1993]). That section provides that the $460,000.00 in question was "additional security" for the loan and specified, in detail, the particulars for disbursement of same which contradicted the claimed oral representations in a meaningful fashion (*see Bango v Naughton*, 184 AD2d 961, 963 [3d Dept 1992]).

The tenth and eleventh affirmative defenses based upon alleged non-compliance with CPLR §2309 fail as a review of the questioned documents reveals they satisfy the certificate of merit and certificate of conformity requirements (*see* CPLR § 2309[c]; CPLR §3012-b; *Moccia v Carrier Car Rental, Inc.*, 40 AD3d 504 [1st Dept 2007]).

The twelfth affirmative defense alleging fraud fails as the Defendants cannot claim to have reasonably relied on oral representations that are plainly at odds with the express terms contained in the loan documents (*see FPG Maiden Lane, LLC v. Bank Leumi USA,* 211 AD3d 528 [1st Dept 2022]; *Coutts Bank (Switz.) Ltd. v Anatian*, 261 AD2d 307 [1st Dept 1999]; *Accredited Aides Plus, Inc. v Program Risk Mgt., Inc.*, 147 AD3d 122 [1st Dept 1989]; *see also Aurora Loan Servs., LLC v Enaw*, 126 AD3d 830 [2d Dept 2015]). The facts also establish that the Defendants made interest payments under the note for over a year and a half after the closing and some sixteen months after Allmond became "[w]orried that a fraud had occurred". This constituted acquiescence and assent to the terms of the loan documents (*see Feinstein v Levy*, 121 AD2d 499, 500 [2d Dept 1986]).

The thirteenth affirmative defense asserts Plaintiff is estopped from foreclosing based upon promises made "processing, underwriting, and closing of defendants' [loan] application". This defense fails for the same reason as the fraud defense (*see Coutts Bank (Switz.) Ltd. v Anatian*, supra at 307).

The fourteenth affirmative defense alleging Plaintiff engaged in predatory lending in violation of unidentified sections of the Banking Law, the Real Estate Settlement Procedures Act and the Federal Truth in Lending Act is completely conclusory and, as a result, insufficiently pled.

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

The sixteenth, nineteenth and fifty-fourth affirmative defenses are unnecessary as they relate to the amount due and owing under the mortgage (*see 1855 E. Tremont Corp. v Collado Holdings LLC,* 102 AD3d 567, 568 [1st Dept 2013]). Even a mortgagor that has defaulted in appearing in a foreclosure action can appear and contest the amount due and owing under the mortgage (*see Wilmington Sav. Fund Socy., FSB v Moriarty-Gentile*, 190 AD3d 890, 892-893 [2d Dept 2021]).

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

The twenty-eighth, thirty-second, thirty-fourth, thirty-sixth, thirty-seventh, thirty-ninth affirmative defenses claiming laches, acquiescence, release and/or novation, accord and satisfaction, detrimental reliance, promissory estoppel, 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 twentieth affirmative defense that the foreclosure action was "brought for purposes of harassment and/or to force a settlement" fails as a matter of law since, in this case, Plaintiff's motivations for exercising bargained for contractual remedies is not a defense to foreclosure (*see Natixis, N.Y. Branch v 20 TSQ Lessee LLC*, ____Misc3d____, 2021 NY Slip Op 50249[U][Sup Ct NY Cty 2021]).

The twenty-first affirmative defense alleges bad faith and breach of the implied covenant of good faith and fair dealing. A mortgagee's perpetration of bad faith in the mortgage procurement process can constitute a defense to foreclosure "as will a misappropriation of security by the mortgagee" (*see Ebc Amro Asset Mgmt. v Kaiser*, 256 AD2d 161, 162 [1st Dept 1998]). The Loan Agreement states that the $460,000.00 reserve would serve as "additional security for the Borrower's obligations under the loan documents". Here, to the extent the defense of bad faith is premised upon the acts of Avatar, and by extension by Plaintiff as assignee (*see eg Madison Liquidity Invs. 119, LLC v Griffith,* 57 AD3d 438, 440 [1st Dept 2008]), in any misappropriation of the loan security, sufficient facts have been pled to state a claim. Furthermore, Hazelrigg's affidavit on this point is entirely conclusory and fails to establish *prima facie* entitlement to dismissal of this defense. However, the defense based on an alleged breach of the implied covenant of good faith and fair dealing is improperly duplicative of the breach of contract claim (*see eg City of New York v 611 West 152nd St., Inc.*, 273 AD2d 125 [1st Dept 2000]).

The twenty-second affirmative defense of usury fails as it is not available to a corporation or an individual guarantor of such an entity's debt (*see* General Obligations Law 5-521; *Schneider v Phelps*, 41 NY2d 238, 242; *Bankers Trust Co. v Braten*, 184 AD2d 239 [1st Dept 1992]).

The twenty-third affirmative defense is based upon Plaintiff's alleged failure to comply with Section 189 of the Housing and Community Development Act of 1987, 12 USC §1701x[c][4], and/or RPAPL §1304. Defendants' claim they were entitled to counselling under Section 189 of the Housing and Community Development Act of 1987 fails as the borrower, Cuisine, is not eligible under that statute (*see* 12 USCS § 1715z-20[d]). Likewise, 12 USC §1701x and RPAPL §1304 are also inapplicable herein as Cuisine is not a natural person nor is the premises its principal residence.

The twenty-fourth affirmative defense based on Real Property Law §254-b also fails as inapplicable. In a foreclosure action where, as here, the mortgagee has elected to accelerate the entire debt, late charges are neither sought nor recoverable (*see Reis v Decker*, 135 Misc. 2d 741 [Cty Ct Del Cty 1987] *see also GAB Mgmt. v Blumberg*, 226 AD2d 499 [2d Dept 1996]).

The twenty-fifth affirmative defense based upon CPLR §§8501 and 8502 fails as Plaintiff proffered proof that it is licensed to do business in New York State.

The twenty-sixth affirmative defense, alleging the action is barred by the statute of limitations, is conclusory and meritless. 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 (*cf. U.S. Bank N.A. v Salvodon*, 189 AD3d 925 [2d Dept 2020]; *21st Mtge. Corp. v Balliraj*, 177 AD3d 687 [2d Dept 2019]).

The twenty-seventh affirmative defense based upon General Business Law §349 is inadequately pled as it is specific to the subject mortgage and does not constitute "consumer-oriented" conduct (*see Wells Fargo Bank, N.A. v Farfan*, 203 AD3d 1107, 1110 [2d Dept 2022]). Defendants were required, but failed, to allege that Plaintiff's acts or practices have a broader impact on consumers at large since private contract disputes, unique to the parties, do not fall within the ambit of the statute (*see New York Univ v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]; *Scarola v Verizon Communications, Inc.*, 146 AD3d 692, 693 [1st Dept 2017]). "[C]onclusory allegations about defendant's practices with other clients are insufficient to save the claim" (*Golub v Tanenbaum-Harber Co. Inc.*, 88 AD3d 622, 623 [1st Dept 2011]). Indeed, Plaintiff was not the original lender and Defendant failed to explain what specific actions by Plaintiff are the foundation of this claim.

The twenty-ninth affirmative defense claiming that the "action is barred by the Statute of Frauds" is dismissed as entirely inapposite. Defendants argue that an oral escrow agreement existed between the parties and expressly claim that it is *outside* the application of GOL §5-701, not precluded by same.

The thirty-third affirmative defense of mitigation is unavailing in a foreclosure action (*see Marine Midland Bank, N. A. v Virginia Woods Ltd.*, 201 AD2d 625 [2d Dept 1994]; *HSBC Bank USA v Rodriguez*, ____Misc 3d____, 2016 NY Slip Op 32123[U][Sup Ct Queens Cty 2016]). Moreover, as this defense relates to the amount due and owing, it is not a viable defense to summary judgment (*see eg 1855 E. Tremont Corp. v Collado Holdings LLC*, supra).

The thirty-eighth affirmative defense claims the Plaintiff's complaint is barred by the "Parole [sic] Evidence Rule". Like the twenty-ninth affirmative defense, reliance on this legal principle is also misguided. Generally, "the parol evidence rule bars proof of an oral condition precedent which . . . is expressly contradicted by the written loan agreement" (*Glenfed Financial Corp., Commercial Finance Div. v Aeronautics & Astronautics Services, Inc.*, 181 AD2d 575, 576 [1st Dept 1992]). Here, Defendants claim the existence of an oral escrow agreement and specifically posit in their memorandum of law that the parol evidence rule is *inapplicable*.

The thirty-ninth affirmative defense pleading unclean hands, assuming it is even applicable in a mortgage foreclosure action[2] (*see National Distillers & Chemical Corp. v Seyopp Corp.*, 17 NY2d 12, 15-16 [1996]), fails in this case (*see Jo Ann Homes at Bellmore, Inc. v Dworetz*, 25 NY2d 112, 122 [1969]; *see also J.T. Magen & Co. Inc. v Nissan N. Am., Inc.*, ____Misc3d____, 2022 NY Slip Op 34168[U][Sup Ct NY Cty 2022]).

The forty-first affirmative defense claiming Jerome Green, Green & Green Associates, Edward Delli Paoli, Esq., and ConArch are necessary parties is insufficiently pled as Defendants do not specify how these parties are indispensable to Plaintiff's foreclosure action, as opposed to simply necessary or permissive (*see* RPAPL §1311; *Polish Natl. Alliance v White Eagle Hall Co.*, 98 AD2d 400, 403 [2d Dept 1983]).

The forty-second affirmative defense, to the extent it is an attempt to reserve the right to assert further affirmative defenses during this action, is incomprehensible and inadequately pled. Any rights in this regard are contained in the applicable sections of the Civil Practice Law and Rules.

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[2] "Case law, however, urges this defense to a mortgage foreclosure action to be facile. No decision has yet found such an interposed defense to both meet the definition of the doctrine and establish the requisite detriment to the asserting party." (1 Bergman on New York Mortgage Foreclosures § 5.08 [2019]).

The forty-third affirmative defense/counterclaim for breach of contract is sufficiently pled as a counterclaim and Plaintiff has not established, *prima facie*, that it did not materially breach any portion of the agreement, particularly, but not exclusively, Schedule 5.18[b][1] of the Loan Agreement. The waivers in the loan documents do not preclude a breach of contract counterclaim (*see Perlstein v Kullberg Amato Picacone/ABP, Inc.*, 158 AD2d 251, 252 [1st Dept 1990]). In addition, as an affirmative defense, Plaintiff has not established in the first instance that a breach of this provision did not prejudiced defendant's ability to pay back the loan (*see City of New York v 611 West 152nd St., Inc.*, 273 AD2d 125, 126 [1st Dept 2001]

The forty-fourth affirmative defense/counterclaim alleging "defamatory conduct" fails as a matter of law. Defamation is founded in a false "statement" which must be pled with particularity (*see Dillon v City of New York*, 261 AD2d 34, 37-38 [1st Dept 1999]). No such statement has been pled.

The forty-fifth affirmative defense/counterclaim declaratory judgment is dismissed as unnecessary. The determination of whether Plaintiff validly accelerated the note is part of Plaintiff's *prima facie* case on a foreclosure cause of action.

The forty-sixth and fiftieth-fourth affirmative defenses/counterclaims for an accounting and injunctive relief is not viable. In an arm's length commercial contractual relationship, a mortgagor is entitled to an accounting only if required by the mortgage documents (*see* 2 Bergman on New York Mortgage Foreclosures § 23.52). Here, the loan agreement, note and mortgage mandate Plaintiff to provide same.

The forty-seventh affirmative defense/counterclaim for a declaratory judgment that the mortgage is void is no longer viable based upon dismissal of any affirmative defense that would constitute a basis to annul the mortgage.

The forty-eighth affirmative defense/counterclaim ordering Plaintiff to perform its obligations under the contract and CPLR §3408 is dismissed as entirely vague and since CPLR §3408 is inapplicable in the action.

The forty-ninth affirmative defense/counterclaim conversion is dismissed as duplicative of the breach of contract claim (*see CDR Creances S.A. v Euro-American Lodging Corp.*, 40 AD3d 421, 422 [1st Dept 2007]).

The fiftieth affirmative defense/counterclaim unjust enrichment is dismissed as duplicative of the breach of contract claim (*see Corsello v Verizon N.Y., Inc.*, 18 NY3d 777 [2012]).

The fiftieth-first affirmative defense/counterclaim for punitive damages is dismissed as this is neither an affirmative defense nor an independent cause of action (*see eg Bunker v Bunker*, 73 AD2d 530 [1st Dept 1979]).

The fiftieth-second affirmative defense/counterclaim RPAPL §282 is dismissed as that statute only applies to an action to foreclose on "residential real property".

The fiftieth-third affirmative defense/counterclaim based upon the alleged violation of Executive Orders 202.8, *et seq*. is dismissed for the reasons stated supra.

The fiftieth-fifth affirmative defense/counterclaim for fraud is dismissed based upon the reasoning stated supra.

The fiftieth-sixth and fiftieth-seventh affirmative defenses/counterclaims based upon breach of fiduciary duty are dismissed based upon the reasoning stated supra.

The fiftieth-eighth affirmative defense/counterclaim pleading that Plaintiff or Avatar acted negligently, recklessly and/or intentionally in managing and servicing the loan fails "since claims based on negligent or grossly negligent performance of a contract are not cognizable" (*City of New York v 611 West 152nd St., Inc.*, supra).

The fiftieth-ninth affirmative defense/counterclaim that a "corrupt agreement" between Plaintiff and Avatar to defraud Defendants existed fails as a civil conspiracy claim cannot stand without an underlying fraud claim (*see FPG Maiden Lane, LLC v. Bank Leumi USA,* supra).

Any affirmative defenses pled 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]).

Plaintiff has established that it is entitled to a default judgment against all non-appearing Defendants (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend 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 Plaintiff's motion for summary judgment on its claim for foreclosure, appointment of a referee is denied, and it is

ORDERED that the branch of the motion to dismiss the affirmative defenses and counterclaims is granted except for the fourth, twenty-first and forty-third, to the extent it is a counterclaim, denied, and it is

ORDERED that the branch of the motion to add Rodney Doe as a Defendant is denied as the New York County Clerk will not accept any judgment with a "Doe" Defendant in the caption; and it is further

ORDERED that the caption of this action is be amended by substituting BK Lobster Uptown Group LLC as ABC Corp. #1 and striking John Doe #3 through #15, Jane Doe #1 through #15, and ABC Corp. #2 through #10, and it is

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

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AVATAR LENOX AVE LLC,

Plaintiff

Index No. 850182/2020

-against-

JACQUELINE ALLMOND CUISINE, INC.; JACQUELINE ALLMOND; ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK; UNITED STATES OF AMERICA; CITY OF NEW YORK DEPARTMENT OF FINANCE; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; BK LOBSTER UPTOWN GROUP LLC;

Defendants

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This matter is set down for a status conference on **May 18, 2023 @ 11:00 am** via Microsoft Teams.

3/8/2023
DATE

HON. FRANCIS A. KAHN, III, A.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