

**Gauntlet Funding, LLC v Brooklyn RE INV LLC**

2023 NY Slip Op 31178(U)

April 3, 2023

Supreme Court, Kings County

Docket Number: Index No. 521177/2021

Judge: Lawrence Knipel

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At an IAS Term, Part 57 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 3<sup>rd</sup> day of April, 2023.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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GAUNTLET FUNDING, LLC,

Plaintiff,

- against -

Index No. 521177/21

BROOKLYN RE INV LLC, QUENSESP ISAAC, GAUNTLET FUNDING LLC, LEROY HANNAH, NYS DEPARTMENT OF TAXATION & FINANCE, NYC ENVIRONMENTAL CONTROL BOARD, "JOHN DOE 1-10", said names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in, or lien upon the premises described in the complaint, and

MANOJ MOHAN, RUPA RATHI MOHAN and ROCKET MORTGAGE LLC F/K/A QUICKEN LOANS, LLC,

Defendants,

and

HOF 1 GRANTOR TRUST 5,

Third-Party Defendant.

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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) \_\_\_\_\_

120-148, 152-165, 166-201  
203-238, 240 258-264

\* Opposing Affidavits (Affirmations) \_\_\_\_\_

152-165, 204-238, 267-268  
241-245, 269-270 251-256,  
279-281

Reply Affidavits (Affirmations) \_\_\_\_\_

266, 267-268, 271-272, 273,  
275-277, 282

Upon the foregoing papers in this action to foreclose a mortgage<sup>1</sup> on the commercial property at 1176 Jefferson Avenue in Brooklyn (Block 3389, Lot 13) (Property), plaintiff Gauntlet Funding, LLC (Gauntlet) moves (in motion sequence [mot. seq.] four) for an order: (1) striking the amended answer of defendants Brooklyn Re Inv LLC (BRI) and Quensesp Isaac (Isaac) “on the grounds that there are no triable issues of fact and that Plaintiff is entitled to summary judgment[,]” pursuant to CPLR 3212 (NYSCEF Doc No. 120 at 2); (2) dismissing defendants BRI and Isaac’s affirmative defenses in their amended answer, pursuant to CPLR 3212 and 3211 (b); (3) dismissing or severing BRI and Isaac’s counterclaims and cross-claims asserted in their amended answer, pursuant to CPLR 3211 (a) and/or 603; (4) granting it default judgments against non-appearing defendants New York State Department of Taxation & Finance and NYC Environmental Control Board, pursuant to CPLR 3215 (a); (5) dismissing or severing the counterclaims and cross-claims asserted against it by defendants Manoj Mohan (M. Mohan), Rupa Rathi Mohan (R. Mohan) (collectively, the Mohans) and Rocket Mortgage LLC f/k/a Quicken Loans, LLC (Rocket) (the Mohans and Rocket are collectively the “Owner Defendants”), pursuant to CPLR 3211 (a) and/or 603; (6) amending the caption to discontinue the action and strike Leroy Hannah and the “John Doe” defendants, pursuant to CPLR 3025; and (7) appointing a referee to compute and ascertain the amount due to it on the first and second mortgages and to report whether the Property can be sold in one parcel, pursuant to RPAPL § 1321.

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<sup>1</sup> Depending on the outcome and factual findings reported after a framed-issue hearing (*see infra*), the nature of this action may change to an action for breach of a joint venture agreement.

Defendants BRI and Isaac cross move (in mot. seq. five) for an order: (1) denying Gauntlet's summary judgment motion, and (2) granting them summary judgment dismissing the complaint and/or on their Second Counterclaim asserted against Gauntlet, pursuant to CPLR 3212 (NYSCEF Doc No. 152).

The Owner Defendants move (in mot. seq. six) for an order:

(a) pursuant to CPLR 2701 and this Court's broad equitable powers:

(i) directing the Law Offices of Frederick J. Giachetti ('Giachetti'), closing attorneys for Rocket, to pay into Court \$880,085.97 that Giachetti is holding in its attorney escrow account on Rocket's behalf, such funds being the amount that Superior Loan Servicing ('Superior'), HOF I Grantor Trust's loan servicer, confirmed on September 14, 2021 was to be paid to satisfy:

(A) a certain Commercial Mortgage, Security Agreement and Fixture Filing dated August 26, 2019 that Defendant B[RI] . . . gave to Loan Funder LLC, Series 9099 ('Loan Funder') on the subject property . . . as security for an indebtedness in the principal amount of \$787,500.00 that was recorded with the Office of the City Register on September 16, 2019 at CRFN 2019000298077 (the 'BRI First Mortgage'); and

(B) a certain Building Loan Mortgage, Security Agreement and Fixture Filing dated August 26, 2019 that BRI gave to Loan Funder on the Property, as security for a further indebtedness up to a maximum principal amount of \$285,000.00 that was recorded with the Office of the City Register on September 16, 2019 at CRFN 2019000298079. . . ;

which funds Giachetti paid to Superior on September 14, 2021, but which were returned to Giachetti on September 17, 2021 following Gauntlet's refusal of such payment;

- (ii) Directing Omni Title Agency ("Omni"), to pay into Court \$175,000.00 that it is holding in escrow, which funds BRI paid to Omni on September 14, 2021 to hold in escrow pending satisfaction of a certain Subordinate Mortgage, Assignment of Rents, Security Agreement and Fixture Filing dated August 26, 2019 that BRI gave to Plaintiff Gauntlet . . . as security for an indebtedness in the principal amount of \$87,500.00 that was recorded with the Office of the City Register on September 16, 2019 at CRFN 2019000298080 (the 'BRI Third Mortgage'; together with the BRI Loan Funder Mortgage, the 'BRI Mortgages') pursuant to a certain Indemnity and Deposit Agreement dated September 14, 2021 entered into between BRI and Omni;
  - (iii) directing BRI to pay into Court \$475,750.63, such amount being the proceeds of the sale of the Property from BRI to the Mohans on September 14, 2021 that the Mohans paid directly to BRI; and
  - (iv) directing that all of such funds remain in Court pending the resolution of the dispute between BRI and Gauntlet; and
- (b) further directing Gauntlet to issue and deliver to the Owner Defendants' counsel in a form suitable for recording:
- (i) original executed satisfactions for the three aforementioned BRI Mortgages;
  - (ii) an original executed termination of a certain UCC Financing Statement given on August 26, 2019 by BRI, as debtor, to Loan Funder, as secured party, that was recorded with the Office of the City Register on March 16, 2021 at CRFN 2021000098096; and thereafter,
- (c) dismissing the Owner Defendants from this action" (NYSCEF Doc No. 166).

The Owner Defendants (the Mohans and Rocket) cross-move (in mot. seq. seven) for an order, pursuant to CPLR 3215, granting them a default judgment against Gauntlet

on their counterclaims, cross claims and third-party complaint verified and dated January 14, 2022, which seeks:

- (1) a declaration that the Mohans are the title owners of the Property, pursuant to a September 14, 2021 deed from defendant BRI that was recorded with the Office of the City Register on October 18, 2021 at CRFN 2021000409850, and that their ownership is not subject to any of Gauntlet's mortgages (the First Counterclaim);
- (2) a declaration that a mortgage on the Property dated September 14, 2021, that the Mohans gave to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Rocket, as security for an indebtedness in the amount of \$1,137,500.00, which mortgage was recorded with the Office of the City Register on October 18, 2021 at CRFN 2021000409851 is a first mortgage against the Property superior to any of Gauntlet's mortgages (the Second Counterclaim); and
- (3) a mandatory injunction requiring Gauntlet to issue, in a form suitable for recording with the Office of the City Register:
  - (A) a satisfaction of a certain Commercial Mortgage, Security Agreement and Fixture Filing dated August 26, 2019 that BRI gave to Loan Funder, as security for an indebtedness in the principal amount of \$787,500.00 that was recorded with the Office of the City Register on September 16, 2019 at CRFN 2019000298077;
  - (B) A satisfaction of a certain Building Loan Mortgage, Security Agreement and Fixture Filing dated August 26, 2019 that BRI gave to Loan Funder, as security for a further indebtedness up to a maximum principal amount of \$285,000.00 that was recorded with the Office of the City Register on September 16, 2019 at CRFN 2019000298079;
  - (C) A satisfaction of a certain Subordinate Mortgage, Assignment of Rents, Security Agreement and Fixture Filing dated August 26, 2019 that BRI gave to Gauntlet, as security for an indebtedness in the principal amount of \$87,500.00 that was recorded with the Office of the City Register on September 16, 2019 at CRFN 2019000298080;

- (D) A termination of a certain UCC Financing Statement against the Property dated August 26, 2019 that BRI, as debtor, gave to Loan Funder, as secured party, that was recorded with the Office of the City Register on September 16, 2019 at CRFN 2019000298175; and
- (E) A termination of a certain UCC Financing Statement against the Property that BRI, as debtor, gave to Gauntlet, as secured party, that was recorded with the Office of the City Register on March 16, 2021 at CRFN 2021000098096 (the Third Counterclaim) (*see* NYSCEF Doc No. 203).

Gauntlet moves (in mot. seq. eight) for an order, pursuant to CPLR 3012 (d), granting it leave to file a late reply to the Owner Defendants' counterclaims and deeming its proposed reply (filed at NYSCEF Doc No. 260), filed and served upon all parties.

### **Background**

#### ***This Foreclosure Action***

On August 18, 2021, HOF I Grantor Trust 5 (HOF), commenced this action to foreclose two commercial mortgages encumbering the Property by filing a summons, a complaint and a notice of pendency against the Property (NYSCEF Doc Nos. 1-5). The commercial mortgages secure a \$787,500.00 commercial promissory note and a \$285,000.00 building loan note, both of which were allegedly executed on August 26, 2019, by BRI, the borrower, and guaranteed by BRI's sole member, Isaac. The complaint alleges that BRI "failed to comply with the conditions of said mortgages by omitting to pay the mortgages in full on the maturity date of August 26, 2020 . . . or within 5 days thereafter . . ." (NYSCEF Doc No. 1 at ¶ 13). Gauntlet, the plaintiff as of December 9, 2021, and

HOF's successor in interest, was originally a party defendant because it holds a third, subordinate mortgage encumbering the Property.

***The September 14, 2021 Property Sale***

On September 1, 2021, defendants BRI and Isaac moved, by order to show cause, for an order enjoining and restraining Gauntlet from interfering with BRI's September 14, 2021 sale of the Property and imposing sanctions on Gauntlet for its alleged refusal to issue a payoff letter for a third mortgage that it granted BRI (*see* NYSCEF Doc No. 23).

On September 7, 2021, the court (Montelione, J.) signed the order to show cause (OSC), which prevented Gauntlet from interfering with the sale of the Property to the Mohans and authorized HOF (the original plaintiff) to place funds in escrow to satisfy Gauntlet's third mortgage:

“Plaintiff *may* place in escrow \$132,000 for satisfaction of mortgage defendant Gauntlet[’s] . . . mortgage on the subject Property if a reputable title company is willing to insure marketable title, with any balance being returned to plaintiff” (*id.* at 2 [emphasis added]).

On September 21, 2021, counsel for BRI and Isaac advised the court that its OSC was withdrawn, since BRI transferred the Property to the Mohans without incident on September 14, 2021 (NYSCEF Doc No. 35).

***BRI and Isaac's Amended Answer***

On September 21, 2021, BRI and Isaac filed an amended answer in which they denied the allegations in the complaint and asserted affirmative defenses, including that

“[p]laintiff orally waived the right to accelerate the principal and foreclose so as to allow the opportunity for Defendants to sell the Property” (NYSCEF Doc No. 34 at ¶ 44). The amended answer also asserts two counterclaims against HOF for: (1) fraudulently conspiring with Gauntlet, to which HOF transferred and assigned the mortgages on September 7, 2021 (prior to the conclusion of the sale of the Property), and (2) an award of attorneys’ fees, pursuant to RPL § 282.

The amended answer alleges that Isaac is the sole member of BRI and that on or about August 26, 2019, BRI entered into a joint venture agreement with Gauntlet regarding the renovation and sale of the Property (JV Agreement) (*id.* at ¶¶ 96 and 98). The amended answer alleges that, under the JV Agreement, BRI:

“‘assumed the role of Operating Partner’ and Gauntlet ‘undertook to provide the equity needed to purchase the subject property and finance the project as required to obtain first lien financing, including down payment, closing costs, insurance, construction, interest payments, taxes, and any other capital needed during [the] project’” (*id.* at ¶¶ 99-100).

The amended answer alleges that “Gauntlet failed to keep its end of the bargain[,]” BRI and Isaac advanced the required down payment and spent an additional \$210,000.00 to complete the renovation project (*id.* at ¶¶ 101-104). BRI allegedly borrowed an additional \$87,500.00 from Gauntlet on August 26, 2019, evidenced by a “subordinate promissory note” secured by a third mortgage on the Property, and Gauntlet allegedly “refused to provide the necessary payoff letter for Mortgage No. 3 . . .” (*id.* at ¶¶ 106-108). The amended answer alleges that Gauntlet “acquired Plaintiff’s loans, by way of fraudulent

assignment” and “[i]t was only post-closing that Gauntlet asserted its capacity as assignee” (*id.* at ¶¶ 110 and 113).

BRI and Isaac’s amended answer asserts the following 10 cross claims<sup>2</sup> against Gauntlet, most of which relate to the JV Agreement: (1) an accounting of “any and all expenditures and/or payments incurred in connection with the equity needed to purchase the Property and finance the project . . .”; (2) indemnification and contribution; (3) breach of the JV Agreement; (4) breach of its fiduciary duty; (5) unjust enrichment; (6) a judgment declaring that “Gauntlet’s approval is not and was not required for anything related to the sale of the subject property and/or that Gauntlet is not entitled to any proceeds pursuant to the JV Agreement”; (7) fraud based on an alleged “scheme” by Gauntlet regarding its acquisition of the mortgages from HOF and its alleged refusal to discharge those mortgages unless it receives more money than is due; (8) tortious interference with BRI and Isaac’s contract to sell the Property; (9) usury; and (10) sanctions for delay caused by Gauntlet’s refusal to discharge the mortgages.

### *Gauntlet’s Reply*

On October 1, 2021, Gauntlet, in reply, denied the material allegations in BRI and Isaac’s counterclaims and asserted affirmative defenses and cross claims alleging that:

“Pursuant to Section 2 of the JV Agreement Gauntlet was to provide the equity to purchase the Property and finance certain construction and renovation to the Property, including paying

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<sup>2</sup> Since Gauntlet’s substitution as plaintiff in place of HOF in December 2021 (by the December 2021 So Ordered Stipulation, *see infra*), BRI and Isaac’s cross claims against Gauntlet are now counterclaims (*see* NYSCEF Doc No. 113 at ¶ 4).

the down payment, closing costs, insurance, construction, interest payments, taxes and any other capital needed to prepare the Property for sale. In exchange, B[RI], as the 'Operating Partner', was to oversee the renovation of the Property, including but not limited to, preparing a construction budget, project timeline, and manage and supervise the construction so that it was in marketable condition.

"Pursuant to Section 5 of the JV Agreement, B[RI] held title of the Property but could not transfer title without the prior written consent of Gauntlet. In fact, the sale of the Property required 100% approval of all partners (B[RI] and Gauntlet) pursuant to Section 8 of the JV Agreement.

"Any proceeds of the sale of the Property were to be disbursed pursuant to the formula set forth in Section 6 of the JV Agreement, including that Gauntlet would be paid the entirety of its equity in the Property.

"B[RI] failed to timely complete construction and obtain a temporary certificate of occupancy ('TCO') for the Property within seven months of the Effective Date of the JV Agreement, or March 26, 2020 as required by Section 2 of the JV Agreement" (NYSCEF Doc No. 38, Gauntlet reply at ¶¶ 45-48).

Essentially, Gauntlet alleges that it advanced funds and covered costs for the renovation project that were BRI's obligation under the JV Agreement, and that BRI "sold the Property to an undisclosed third-party on September 14, 2021 without obtaining Gauntlet's prior written approval" (*id.* at ¶ 54). Gauntlet also alleges that on September 7, 2021, it obtained rights to the first and second mortgages from HOF and recorded the mortgage assignment on the "morning" of September 14, 2021, *before* BRI's sale of the Property to the Mohans concluded (*id.* at ¶ 55). Gauntlet's reply alleges that "[t]he sale of

the Property occurred without the satisfaction of the mortgage[s]” and “[t]o date, Gauntlet has not received any proceeds of [BRI’s] sale of the Property under the JV agreement or funds to satisfy the Mortgages” (*id.* at ¶¶ 58-59).

Gauntlet’s reply asserts affirmative defenses, including that BRI “was required to obtain Gauntlet’s written approval prior to selling the subject property pursuant to the terms and conditions of the JV Agreement[,]” the “payoff letter issued in the amount of \$880,055.97 was not correct, is void and of no force and effect so that Mortgages Nos. 1 and 2 were not fully satisfied” at the September 14, 2021 closing and BRI “defaulted under its obligations of the JV Agreement by, among other things, not completing construction in time to permit it to obtain the temporary certificate of occupancy for the building on the Property within seven months” (*id.* at ¶¶ 63, 66 and 67).

Gauntlet’s reply also asserts the following eight claims against BRI and Isaac: (1) unjust enrichment based on the allegations that Gauntlet contributed funds to the Property and BRI “would be unjustly enriched if it was permitted to retain the proceeds from the sale of the Property that exceed the [first and second] Mortgages”; (2) BRI breached the JV Agreement “by wrongfully withholding Gauntlet’s portion of the sale proceeds . . .”; (3) BRI breached the JV Agreement “by not timely obtaining the [temporary certificate of occupancy], co-mingling funds . . . with funds of other construction projects and by not timely making mortgage payments resulting in increased interest being owed and this foreclosure action”; (4) a judgment declaring that “(i) Gauntlet was not and is not in default

under the JV Agreement, (ii) B[RI] was required to obtain Gauntlet's prior written approval prior to selling the subject property, and (iii) B[RI] is in default of the JV Agreement because it sold the subject property without Gauntlet's prior written approval"; (5) BRI breached its fiduciary duty to Gauntlet "by concealing the sale of the Property and the terms thereof from Gauntlet, not obtaining Gauntlet's prior written approval to sell the Property and refusing to disburse the sale proceeds pursuant to the JV Agreement"; (6) "Isaac breached its fiduciary duty to Gauntlet by concealing the sale of the Property and the terms thereof from Gauntlet, not obtaining Gauntlet's prior written approval to sell the Property and refusing to disburse the sale proceeds pursuant to the JV Agreement"; (7) a permanent injunction against BRI and Isaac to: (i) produce a closing statement of the sale of the Property to identify the amount of the sale proceeds being held by BRI; (ii) enjoining BRI or managers from transferring, disbursing, assigning or concealing funds it received from the sale of the Property, and (iii) direct that such funds be held in an escrow account"; and (8) "an order of attachment permitting the sheriff to seize the proceeds of the sale of the Property being held by B[RI] or Isaac" (*id.* at ¶¶ 75, 82, 84 and [mis-numbered] ¶¶ 70, 74, 80, 89 and 96).

***The December 2021 "So Ordered" Stipulation***

On October 27, 2021, the Owner Defendants moved, by OSC, for leave to intervene in this foreclosure action as party defendants, pursuant to CPLR 1012 (a) (3), since BRI

transferred the Property to the Mohans by a September 14, 2021, deed and Rocket issued a \$1,137,500.00 purchase money mortgage to the Mohans (NYSCEF Doc Nos. 70-102).

On November 4, 2021, Gauntlet moved to amend the caption to be substituted as plaintiff in place of HOF based on its acquisition of the first and second mortgages by assignment from HOF on September 7, 2021 (NYSCEF Doc No. 103-107).

By the parties' stipulation, so ordered by this court on December 16, 2021 (December 2021 So Ordered Stipulation), the parties resolved the two motions by agreeing that: (1) Gauntlet was substituted herein as plaintiff; (2) the Owner Defendants (the Mohans and Rocket) were joined as party defendants; (3) the caption was amended accordingly; (4) the pleadings survived the substitution of Gauntlet as plaintiff, as described in the December 2021 So Ordered Stipulation; (5) the Owner Defendants shall serve and file responsive pleadings, including counterclaims against Gauntlet and cross claims against any defendant or HOF as third-party defendant "within thirty (30) days of the entry of this 'so ordered' Stipulation"; and (6) the "[p]arties shall serve and file a response to any counterclaims or cross-claims interposed by the Intervenor Defendants [the Mohans and Rocket] within thirty (30) days of the Intervenor Defendants' service and filing of their responsive pleading" (*see* NYSCEF Doc No. 113, the December 2021 So Ordered Stipulation).

*The Owner Defendants' Answer, Counterclaims,  
Cross Claims and Third-Party Complaint*

On January 14, 2022, the Owner Defendants filed their verified answer to the complaint in which they denied knowledge or information regarding the truth of the foreclosure allegations, but asserted that:

“(a) the Mohans are the current owners of the subject property . . . pursuant to a deed dated September 14, 2021, from B[RI] . . . that was recorded with the Office of the City Register on October 18, 2021 at CRFN 2021000409850 (the ‘Mohan Deed’); and (b) Rocket is the current assignee and holder of the wet-ink original of a mortgage on the Subject Property given on September 14, 2021 and recorded with the Office of the City Register on October 18, 2021 at CRFN 2021000409851, from the Mohans to Mortgage Electronic Registration Systems, Inc. (‘MERS’), as nominee for Rocket (the ‘Mohan Mortgage’), which mortgage is security for a \$1,137,500.00 loan (the ‘Purchase Loan’) that Rocket gave to the Mohans, which loan is memorialized by a note (the ‘Mohan Note’) executed by the Mohans in favor of Rocket, the wet-ink original of which Mohan Note Rocket is in possession of” (NYSCEF Doc No. 115 at ¶ 16).

The Owner Defendants asserted affirmative defenses, including: (1) “[t]he two loans secured by the subject mortgages were fully satisfied on September 14, 2021 by full payment of the payoff amount of both such loans, as confirmed on such date by Superior Loan Servicing (‘Superior’), the servicer for such loan”; (2) that Gauntlet’s first and second mortgages are subordinate to the Mohans’ ownership interest and Rocket’s mortgage encumbering the Property;<sup>3</sup> (3) statute of limitations; (4) lack of standing; and (5) fraud

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<sup>3</sup> Notably, the Owner Defendants admit that Gauntlet’s mortgage assignments “were not actually recorded until after the closing had begun and less than an hour *before* the closing [ended]” (*id.* at

because Gauntlet “never disclosed that it was the assignee of the subject loans and mortgages at any point in advance of the closing, and the assignments of mortgage in favor of Gauntlet were not recorded until after the closing had already started” (*id.* at ¶¶ 32- 41).

The Owner Defendants also asserted counterclaims against Gauntlet for: (1) a declaration, pursuant to RPAPL Article 15, that the Mohans are title owners of the Property “free and clear from any mortgage lien or other interest in the Subject Property that Gauntlet, as HOF’s successor-in-interest to the BRI Loan Funder Mortgages, may claim”; (2) a declaration, pursuant to RPAPL Article 15, that Rocket’s purchase money mortgage issued to the Mohans “creates a first mortgage against the Subject Property superior to” the first, second and third mortgages held by Gauntlet; and (3) a mandatory injunction requiring Gauntlet, as the holder of all three of the mortgages, to issue satisfactions of all three of such mortgages in a form suitable for recording with the Office of the City Register; or, alternatively (4) fraud against HOF and Gauntlet for failure to disclose the September 7, 2021 assignment of the three mortgages encumbering the Property to the Mohans and Rocket in advance of the September 14, 2021 closing of BRI’s sale of the Property to the Mohans so that the Owner Defendants could confirm that Superior, the loan

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¶ 59 [emphasis added]). There is no dispute that the Owner Defendants had actual knowledge of the existence of the first and second mortgages when they purchased the Property in 2021, since the mortgages had been recorded since September 2019. Because the September 7, 2021 mortgage assignments were admittedly recorded on September 14, 2021 at 10:53:21 am and 10:53:22 am (*id.* at ¶ 122), *before* the closing concluded, the Mohans took ownership of the Property with constructive knowledge that Gauntlet acquired the mortgages on September 7, 2021.

servicer who provided them with payoff figures prior to closing, was acting for Gauntlet (*id.* at ¶¶ 141, 181, 190, 222 and 251).<sup>4</sup>

The Owner Defendants asserted cross-claims against BRI and Isaac for: (1) breach of the contract to purchase the Property by representing (in ¶ 11 [a] [i]) that BRI had the full, right, power and authority to sell the Property;<sup>5</sup> (2) rescission of the purchase contract for lack of consideration; (3) unjust enrichment; and (4) monies had and received.

Gauntlet failed to respond to the Owner Defendants' January 14, 2022 counterclaims within the time required under the December 2021 So Ordered Stipulation (NYSCEF Doc No. 113).

#### ***Gauntlet's Instant Summary Judgment Motion***

On June 29, 2022, Gauntlet moved for summary judgment to foreclose the mortgages encumbering the Property, an order striking BRI and Isaac's amended answer, dismissing their affirmative defenses, dismissing or severing their counterclaims and cross-claims, a default judgment against the non-appearing defendants, an order of reference and to amend the caption.

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<sup>4</sup> The Owner Defendants' counterclaims allege that the payoff amounts for the mortgages provided by Superior as servicer were paid at closing, but that Gauntlet refused to provide a payoff for the third mortgage and refused to issue satisfactions for the mortgages at issue in this foreclosure action based on its claim that the Rocket mortgage did not satisfy the mortgages because the correct payoff figures are higher than those improperly provided by Superior (*id.* at ¶¶ 249-251).

<sup>5</sup> In contravention, Gauntlet alleges that BRI had no authority to sell the Property without its authority and consent under the terms of the JV Agreement (*see supra*).

Gauntlet submits an affidavit from its co-manager, Luigi Forino (Forino), who attests to BRI's August 26, 2019 execution of the \$787,500.00 first commercial note secured by a mortgage on the Property, the \$285,000.00 building loan note secured by a building loan mortgage and Isaac's personal guarantee (NYSCEF Doc No. 121 at ¶¶ 3-7). Forino attests that Gauntlet is the owner and holder of the commercial note, the building loan note and the guarantee pursuant to written mortgage assignments and allonges executed by HOF in Gauntlet's favor (*id.* at ¶ 8 and NYSCEF Doc No. 129).

Forino attests that contemporaneously with the execution of the loans, BRI and Gauntlet entered into the JV Agreement regarding their renovation and sale of the Property (NYSCEF Doc No. 121 at ¶ 10). Forino explains that Isaac, with whom he had done business previously, had construction experience to oversee the project, while he was responsible for funding under the JV Agreement (*id.* at ¶ 11). Forino asserts that “[i]n default of its obligations under the JV Agreement . . . B[RI] did not obtain the [temporary certificate of occupancy] by the [March 26, 2020] Completion Date, and in fact did not complete construction and obtain a temporary TCO until more than a year later” (*id.* at ¶ 15). Forino asserts that the Property “was not sold before the August 26, 2020 maturity dates of the Commercial Loan and the Building Loan [and] B[RI] did not make the required payments due on maturity” (*id.* at ¶ 16).

Forino attests that “[a]t the end of July 2021 and in August 2021, the Guarantor [Isaac] informed me that that a contract of sale was executed for the Mortgaged Premise[,]”

despite the fact that Sections five and eight of the JV Agreement required both BRI and Gauntlet's approval for any sale and Gauntlet's prior written consent (*id.* at ¶¶ 17-18).

Forino further attests that:

“In late August 2021, I received a request for a payoff letter for Gauntlet's third mortgage of the Mortgaged Premises. I was confused by this request because I had never received any information about any impending sale, and Gauntlet had not provided its prior written consent to any sale of the Mortgaged Premises as was required by the JV Agreement.

“In the course of . . . B[BRI]'s attempts to market and sell the Mortgaged Premises, upon information and belief, HOF's servicing agent Superior . . . provided a payoff letter to [BRI's] and the Guarantor's counsel Donovan Griffiths, Esq. reflecting the amount due on the Commercial Note and the Building Loan Note to be \$1,023,231.50 as of August 16, 2021 (the 'Payoff Letter') . . .

“To impair the Borrower's attempt to sell the Mortgaged Premises in violation of the JV Agreement and to thwart its apparent attempt to deprive Gauntlet of its share of the sale proceeds, on September 7, 2021 Gauntlet closed on its purchase of, and took an assignment of the Commercial Note, the Commercial Mortgage, the Building Loan Note, and the Building Loan Mortgage, from the original plaintiff in this action, HOF . . .” (*id.* at ¶¶ 19-21).

Forino attests that on the morning of September 8, 2021, he emailed HOF's servicer, Superior, to confirm that it received the wire transfer from Gauntlet's purchase of the loans and directed Superior “to ensure that no satisfactions of mortgage go out, and to not confirm or accept any payoffs” and that Gauntlet's counsel emailed HOF's counsel and advised

them of his request that Superior refuse any payoff or discontinuation of this foreclosure action (*id.* at ¶¶ 24-25). Forino further attests that:

“despite my clear and unambiguous instructions, which S[uperior] had acknowledged and indicated it would comply with on September 8, 2021, S[uperior] provided another payoff letter, apparently to the B[RI] or Mr. Griffiths, inexplicably reflecting the amount due on the Commercial Note and the Building Loan Note to be only \$880,055.97 as of September 15, 2021 (the ‘Defective Payoff Letter’). . . .” (*id.* at ¶ 27).

Forino asserts that BRI proceeded with the September 14, 2021 sale of the Property without Gauntlet’s prior written consent, as required under the JV Agreement. However, based on Forino’s prior instructions, Superior rejected the payoff based on the allegedly Defective Payoff Letter and Gauntlet did not provide satisfactions of the first, second and third mortgages, which Forino claims “remain valid, enforceable liens and encumbrances on the Mortgaged Premises” (*id.* at ¶ 34).

Forino argues that Gauntlet is entitled to summary judgment, as a matter of law and that the “only remaining issue in this action is the amount of the judgment which Gauntlet is entitled to which, our attorneys advise me, should be determined by a Referee” (*id.* at ¶ 42).

Gauntlet also submits an attorney affirmation arguing that “[a]t no time after the maturity of the Mortgages did Gauntlet agree to accept anything less than everything it was entitled to recover under the loan documents” and “despite Gauntlet’s best efforts, its clear and unambiguous instructions were ignored, and the Closing occurred [and] S[uperior]

having given, in addition to an unauthorized payoff letter, an incorrect payoff number”

(NYSCEF Doc No. 122 at ¶¶ 73 and 76). Gauntlet’s counsel asserts that:

“S[uperior’s] mistake in providing the Borrower Defendants and their counsel with an incorrect payoff amount, a month after the Borrower Defendants’ counsel had received a correct payoff amount which was for a significantly higher amount, could not have been reasonably relied upon by the Borrower Defendants to believe they could pay off the Commercial Loan Note and the Building Loan Note, owed to Gauntlet, not HOF” (*id.* at ¶ 94).

Gauntlet also submits a memorandum of law arguing that BRI’s, Isaac’s and the Owner Defendants’ affirmative defenses, counterclaims, cross-claims and the Mohan’s third-party complaint are all “patently without merit” and should either be dismissed or severed.

***BRI and Isaac’s Summary Judgment Cross Motion***

On August 2, 2022, BRI and Isaac cross-moved for an order denying Gauntlet’s summary judgment motion, granting them summary judgment dismissing the complaint and for judgment on their second counterclaim against Gauntlet for indemnification and contribution.

Isaac, BRI’s sole member, submits an affidavit in which he attests that BRI and Gauntlet entered into the JV Agreement in August 2019 to renovate and sell the Property (NYSCEF Doc No. 163 at ¶¶ 3-4). Isaac attests that while the mortgages were “taken in” BRI’s and his names, Gauntlet was required to provide equity to purchase the Property and finance its renovation under the terms of the parties’ JV Agreement (*id.* at ¶¶ 5-6). Isaac attests that BRI “duly complied with all of its obligations under the JV Agreement” (*id.* at

¶ 8). Isaac also attests that “as Gauntlet failed in keeping its end of the bargain, B[RI] had to advance the required down payment for the Property and make payments on the mortgages encumbering the Property, even during the mandated Covid-19 pandemic construction moratorium” (*id.* at ¶ 9). Isaac attests that “B[RI] entered into a loan agreement with Gauntlet for the sum of \$87,500.00, memorialized by a subordinate promissory note dated August 26, 2019, which was secured by a [third] mortgage on the Property” (*id.* at ¶ 13). Isaac claims that he requested that Gauntlet provide him with a pay-off letter for the third mortgage to no avail, and that “[i]nstead, Gauntlet, under the guise of providing payoff numbers, provided sums which were conflated with what they sought to recover under the JV Agreement” (*id.* at ¶¶ 16-18). Isaac asserts that “Gauntlet’s breach of its duties under the JV Agreement ultimately led HOF . . . to commence the instant foreclosure action” (*id.* at ¶ 12).

Defense counsel submits an affirmation asserting that Gauntlet failed to meet its burden of proof and claims that Gauntlet’s summary judgment motion is “rife with blatant misstatements of fact (*i.e.*, that Gauntlet, and not Defendants, had the obligation to make the payments under the subject mortgages . . .), conclusory statements and counsel’s suppositions” (NYSCEF Doc No. 153 at ¶ 2). Defense counsel argues that “the relevant mortgages have been fully satisfied; therefore, there is no basis for this action” (*id.* at ¶ 4).

***The Owner Defendants’ CPLR 2701 Motion***

On August 2, 2022, the Owner Defendants moved for an order directing Rocket's closing counsel, Omni and BRI to deposit money into court, pursuant to CPLR 2701. The Owner Defendants also seek an order directing Gauntlet to issue satisfactions for the subject mortgages and that they be dismissed from this action.

***The Owner Defendants' Cross Motion For A Default Judgment Against Gauntlet On Their Counterclaims***

On August 2, 2022, the Owner Defendants cross-moved for a default judgment against Gauntlet on their counterclaims to which Gauntlet failed to reply.

***Gauntlet's Motion For Leave To File A Late Reply To The Owner Defendants' Counterclaims***

On September 7, 2022, Gauntlet, in turn, moved for an order, pursuant to CPLR 3012(d), granting it leave to file a late reply to the Owner Defendants' counterclaims to quiet title and compel satisfactions of the mortgages in the form attached as NYSCEF Doc No. 260. Plaintiff's counsel argues that:

"Gauntlet's causes of action in this foreclosure case are inextricably intertwined with [the] Mohan Defendants' counterclaims to quiet title and to compel Gauntlet to file satisfactions of the mortgages. As evidenced in Gauntlet[']s pending motion for summary judgment and its proposed reply to [the] Mohan Defendants' counterclaims . . . Gauntlet does not believe the three mortgages it holds were satisfied or that the mortgage held by Rocket is . . . superior to its mortgages" (NYSCEF Doc No. 259 at ¶ 3).

Counsel further claims that Gauntlet issued payoff letters for each of the mortgages, and submits as Exhibit B (see NYSCEF Doc No. 261) a September 17, 2021 email and

letter from plaintiff's counsel directing BRI's counsel not to distribute the proceeds of the September 16, 2021 sale of the Property because: (1) BRI wrongfully sold the Property without Gauntlet's prior written consent, as required in the JV Agreement, and (2) "Gauntlet is the holder and owner of the three mortgages of the Subject Property and has yet to receive the payoff funds to satisfy and release such mortgages" (*id.*).

### Discussion

(1)

#### *The Summary Judgment Motion and Cross Motion*

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish

the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and evidence of the borrower’s default (*see Deutsche Bank Natl. Trust Co. v Karibandi*, 188 AD3d 650, 651 [2020]; *Christiana Trust v Moneta*, 186 AD3d 1604, 1605 [2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2017]).

This, however, is not the typical action to foreclosure a commercial mortgage. Gauntlet’s foreclosure of the two mortgages it acquired from HOF on September 7, 2021 is inextricably intertwined with the claims, affirmative defenses and third-party claims asserted by BRI, Isaac and the Owner Defendants regarding the alleged satisfaction of those mortgages at the September 14, 2021 closing of the transfer of the Property from BRI to the Mohans. Gauntlet’s moving papers and defendants’ opposition reveal several factual issues precluding summary judgment in favor of any of the parties, including: (1) Superior’s authority to issue a valid payoff letter for the September 14, 2021 closing; (2) the binding effect of the allegedly “Defective Payoff Letter” for \$880,055.97 issued by Superior, which is determinative of whether Gauntlet must issue satisfaction of the subject mortgages; and (3) the correct amount of the payoff as of the September 14, 2021 closing. Discovery limited to these factual issues, which can be considered and reported to this court after a framed-issue hearing, would clarify and reveal whether the subject mortgages are

enforceable liens still encumbering the Property, or whether they were satisfied at the September 14, 2021 closing, and whether an order directing the issuance of mortgage satisfactions is warranted. A framed-issue hearing will narrow the parties' cognizable legal claims and clarify the actual nature of this litigation, most of which seemingly relates to purely monetary claims between Gauntlet and BRI regarding the renovation of the Property in contemplation of its sale in accordance with the parties' JV Agreement.

(2)

*The Owner Defendants' CPLR 2701 Motion*

The Owner Defendants move for an order, pursuant to CPLR 2701 and "this Court's broad equitable powers," directing: (1) Rocket's closing attorney to pay the \$880,085.97 allegedly used to satisfy the commercial mortgages from his escrow account into court; (2) the title company, Omni Title Agency (Omni), to pay the \$175,000.00 allegedly used to pay off the subordinate third mortgage encumbering the Property into court; and (3) directing BRI to pay \$475,750.63, the alleged proceeds of the sale of the Property to the Mohans, into court. The Owner Defendants seek that such funds be paid into court and that such funds "remain in Court pending the resolution of the dispute between BRI and Gauntlet regarding the JV Agreement (NYSCEF Doc No. 166 at ¶ [a] [iv]).

CPLR 2701 provides that:

“The court, upon motion or on its own initiative, with such notice as it deems proper, may order personal property capable of delivery which is the subject of the action, paid into court, or delivered to such person as it may direct, with such security as the court shall direct, and subject to its further direction if:

“1. A party has such property in his possession, custody or control as trustee for another party or where it belongs or is due to another party; or

“2. A party has such property in his possession, custody or control and it belongs or is due to another party, where special circumstances make it desirable that payment or delivery to such other party should be withheld; or

“3. The ownership of such property will depend on the outcome of a pending action and no party is willing to accept possession or custody of it during the pendency of the action.”

While there is a dearth of case law applying CPLR 2701, the Second Department has held in a foreclosure action that “[t]he court improperly directed the appellant, Rhena Seidman, the purchaser of the subject property, to pay the disputed mortgage installments into court since the court may not direct such payment simply to provide security for satisfaction of a possible judgment” (*Rosenblat v Seidman*, 243 AD2d 699, 699-700 [1997]).

Here, the Owner Defendants CPLR 2701 motion to direct Rocket’s closing counsel, Omni and BRI to pay money into the court fails to show that “no party is willing to accept possession or custody of it during the pendency of the action” or “that the other party is a trustee or that the monies held by the other party are due to the movant[.]” as required by CPLR 2701 (*see* 12B Carmody-Wait 2d § 81:2). As previously discussed (*see supra*), there

are factual issues regarding the binding effect and accuracy of the payoff letter issued by Superior for the September 14, 2021 closing. Whether the Court holds the escrow funds pursuant to CPLR 2701, or those funds are securely held in escrow by others pending the hearing and ultimate determination of those outstanding factual issues, is immaterial at this stage of this litigation, since the parties' rights to those escrowed funds are in dispute.

Consequently, it is unclear that the funds that the Owner Defendants seek to be paid into court are due to them, and thus, this branch of the Owner Defendants' motion, including their requests for an order directing Gauntlet to issue mortgage satisfactions and dismiss them from this action, are denied without prejudice to renewal.

(3)

The Owner Defendants cross-move for a default judgment against Gauntlet on their January 14, 2022 counterclaims, pursuant to CPLR 3215 (NYSCEF Doc No. 203 at 2). Gauntlet, in turn, moves for an order granting it leave to file a late reply to the Owner Defendants' counterclaims, pursuant to CPLR 3012 (d) (NYSCEF Doc No. 258).

CPLR 3012 (d) provides that:

“(d) Extension of time to appear or plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.”

“In light of the public policy favoring the resolution of cases on their merits, the Supreme Court may compel a [counterclaiming] plaintiff to accept an untimely [reply] (*see* CPLR

2004,<sup>6</sup> 3012 [d]) where the record demonstrates that there was only a short delay in appearing or answering the [counterclaims], that there was no willfulness on the part of the [counterclaim] defendant, that there would be no prejudice to the [counterclaimants], and that a potentially meritorious defense exists” (*Yongjie Xu v JJW Enterprises, Inc.*, 149 AD3d 1146, 1147 [2017]).

Under the circumstances presented here, where the delay was minor, the case is in its early stages and there is no discernable prejudice to the Owner Defendants, Gauntlet’s motion for leave to file a late reply to the Owner Defendants’ January 14, 2022 counterclaims in the form attached as NYSCEF Doc No. 260 is granted in this court’s discretion (*Leogrande v Glass*, 106 AD2d 431, 432 [1984] [order compelling plaintiff to accept late answer was properly granted by the court as a matter of discretion]). Consequently, the Owner Defendants’ motion for a default judgment against Gauntlet on their counterclaims is denied as moot. Accordingly, it is hereby

**ORDERED** that Gauntlet’s summary judgment motion (mot. seq. four) is only granted to the extent that this action is discontinued as against defendants Leroy Hannah and the “John Doe” defendants and those defendants are hereby stricken from the caption;

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<sup>6</sup> CPLR 2004 provides that “the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed” (emphasis added). Thus, this court may, in its discretion, extend Gauntlet’s reply time fixed by the December 2021 So Ordered Stipulation.

the motion is otherwise denied without prejudice to renewal after the conclusion of the framed-issue hearing; and it is further

**ORDERED** that BRI and Isaac's summary judgment cross motion (mot. seq. five) seeking to dismiss the complaint and for judgment on its second counterclaim against Gauntlet is denied without prejudice to renewal after the conclusion of the framed-issue hearing; and it is further

**ORDERED** that the Owner Defendants' motion (mot. seq. six) is denied without prejudice to renewal after the conclusion of the framed-issue hearing; and it is further

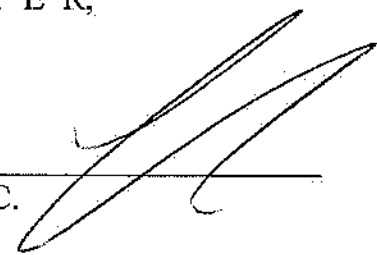
**ORDERED** that the Owner Defendants' cross motion (mot. seq. seven) for a default judgment against Gauntlet on their January 2022 counterclaims, pursuant to CPLR 3215, is denied as moot; and it is further

**ORDERED** that Gauntlet's motion (mot. seq. eight) for leave to file a late reply to the Owner Defendants' January 2022 counterclaims, pursuant to CPLR 3012 (d), is granted and Gauntlet's proposed reply (*see* NYSCEF Doc No. 260) is hereby deemed to be filed and served on all parties; and it is further

**ORDERED** that the parties shall appear before a Special Referee to be assigned by Part 82 who will hear and report to this court regarding the factual issues identified in this decision and order regarding the alleged satisfaction of the subject mortgages (*see supra* at 22-23), after supervising limited discovery by the parties regarding those issues and holding a framed-issue hearing.

This constitutes the decision and order of the court.

E N T E R,

  
\_\_\_\_\_  
J. S. C.

HON. LAWRENCE KNIPEL  
ADMINISTRATIVE JUDGE