

**Wells Fargo Bank, N.A. v JTRE 240 E. 54th St. LLC**

2023 NY Slip Op 32565(U)

July 25, 2023

Supreme Court, New York County

Docket Number: Index No. 850091/2022

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE BENEFIT OF THE HOLDERS OF COMM 2018-COR3 MORTGAGE TRUST COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2018-COR3,

INDEX NO. 850091/2022

MOTION DATE N/A

MOTION SEQ. NO. 002

Plaintiffs,

- v -

**DECISION + ORDER ON MOTION**

JTRE 240 EAST 54TH STREET LLC, JACK TERZI, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, ABECO CONSTRUCTION, LLC, JOHN DOES 1 THROUGH 10

Defendants.

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107

were read on this motion for SUMMARY JUDGMENT.

Plaintiff, Wells Fargo Bank, National Association, as Trustee, for the benefit of the holders of COMM 2018-COR3 Mortgage Trust Commercial Mortgage Pass-Through Certificates, Series 2018-COR3 (“Plaintiff” or “Lender”), acting by and through its special servicer, Midland Loan Services, a division of PNC Bank, National Association (“Midland”) moves for summary judgment and related relief on its claim seeking foreclose a mortgage securing a loan in the original principal amount of \$42,000,000.00 against, among other collateral, property located at 240 East 54 Street in the City of New York, Block 1327, Lot 29 (the “Property”).

Specifically, Lender requests that the Court: (i) grant summary judgment pursuant to CPLR 3212 in favor of Lender and against defendant JTRE 240 East 54th Street LLC (“Borrower”) and defendant Abeco Construction, LLC (“Abeco”) on the Complaint’s First Cause of Action for Foreclosure of the Mortgage; (ii) award to Lender its fees, costs and expenses as provided by the Loan Documents; (iii) grant default judgment in favor of Lender and against defendants New York City Department of Finance, New York State Department of Finance and Taxation and New York City Environmental Control Board (collectively, the “Defaulted Defendants”) and excise defendants “John Does 1 through 10” from the caption of this action; and (iv) appoint a referee to ascertain and compute the amount due to Lender.

Only Borrower and Defendant Jack Terzi (“Terzi”) (collectively, “Defendants”) have opposed this motion.<sup>1</sup> Terzi also cross-moves to dismiss the action against him. For the following reasons, Lender’s motion is granted, and the cross-motion is denied.

### DISCUSSION

#### *A. Plaintiff Has Established Borrower’s Default on its Payment Obligations.*

“[W]hen there is no genuine issue to be resolved at trial, the case should be summarily decided” (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “[I]n moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default” (*HSBC Bank USA, N.A. v Bermudez*, 175 AD3d 667, 668 [2d Dept 2019]). “[A] plaintiff can establish a default by submission of an affidavit from a person having personal knowledge of the facts, or other

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<sup>1</sup> While Plaintiff’s motion papers included the required Commercial Division Rule 19-a Statement of Undisputed Material Facts, a supporting Affidavit and an Affirmation, Borrower and Terzi failed to submit a responsive Rule 19-a Statement or any testimonial or other evidence to dispute the facts presented in Plaintiff’s motion.

evidence in admissible form” (*Wells Fargo Bank, N.A. v Gross*, 202 AD3d 882, 885 [2d Dept 2022]). “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). “The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment” (*Am. Sav. Bank FSB v Imperato*, 159 AD2d 444 [1st Dept 1990]).

In support of its *prima facie* case, Lender has submitted the Mortgage, the unpaid Notes and evidence of Borrower’s default (*see* NYSCEF 65 [“Henderson Aff.”] ¶¶ 24-43 [defaults], NYSCEF 67 [Mortgage], 72 [Note A-1] and 73 [Note A-2]).

In response to Lender’s submission, Defendants argue that the Affidavit of James Henderson, an Asset Manager with Midland Loan Services, a division of PNC Bank National Association (NYSCEF 65), merely attested to Borrower’s default in payment and his knowledge was based on his review of unidentified business records, which he failed to attach to his affidavit, and therefore, his assertions regarding Borrower’s alleged default constituted inadmissible hearsay and lacked probative value. In response, Lender has submitted a Supplemental Affidavit from Mr. Henderson, who has attached Loan Histories from Plaintiff’s Business Records reflecting all credits and debits recorded on the Loan since January 1, 2020 (*see* NYSCEF 104 [“Supp Henderson Aff.”] ¶¶ 7-12 & Exs. A-B). These Business Records corroborate Mr. Henderson’s testimony and demonstrate that no payment has been received from Borrower on the Loan since March 6, 2020, and thus any technical defect in the original affidavit has been cured. More importantly, since Borrower has submitted no evidence to suggest that it *has* paid the Mortgage, Borrower has failed to raise an issue of fact on this core question.

***B. Plaintiff Has Established Borrower's Default on its Lien Covenant.***

Plaintiff has established Borrower's default on its lien covenant by attaching (i) a Mechanic's Lien filed against Borrower and tenant Clean Market Holding, LLC, by defendant Abeco on June 18, 2020, in the amount of \$19,203.55 (*see* Henderson Aff. ¶ 40; NYSCEF 84 ["Mechanic's Lien"]); (ii) the Loan Agreement, which prevents Borrower from permitting any liens (including a mechanic's lien) on all or any portion of the Property unless such Lien is bonded or discharged within thirty (30) days after Borrower first receives notice of such Lien (*see* Henderson Aff. ¶ 38; NYSCEF 68 ["Loan Agreement"]) § 5.27; p. 9) and provides that a breach of this covenant is an Event of Default (Loan Agreement § 8.1[h]); and (iii) Lender's notice to Borrower that Borrower must provide evidence that the Lien was timely bonded or discharged as required by Section 5.27 of the Loan Agreement (NYSCEF 85 [Aug. 6, 2020 Letter]), to which there was no response nor has Borrower bonded or discharged the Mechanic's Lien, which constitutes an additional Event of Default under Section 8.1 of the Loan Agreement (*see* Henderson Aff. ¶¶ 42-43; Loan Agreement § 8.1[h]).

Lender has also established that its Mortgage is superior to the Mechanic's Lien as a matter of law since the Mortgage was recorded on October 10, 2017, while the Mechanic's Lien was not filed until June 18, 2020 (*see* NYSCEF 64 ["Stmt."] ¶¶ 6, 34; *see also* Mortgage; Mechanic's Lien), and the Mortgage does not qualify as a building loan mortgage (*see* Stmt. ¶ 4; *Natixis, NY Branch v 20 TSQ Lessee LLC*, 71 Misc 3d 1201[A], 2021 NY Slip Op 50249[U], \*8 [Sup Ct, NY County 2021] ["Recorded mortgages generally have priority over subsequently-filed mechanic's liens (Lien Law §13.1). But if a mortgage qualifies as a "building loan mortgage" (BLM), made pursuant to a "building loan contract" (BLC), then the mortgage is superior *only if* it is filed in accordance with Lien Law §22."]; *Pietrzak & Pfau Eng'g &*

*Surveying, LLC v Yael, LLC*, 38 Misc 3d 1219[A], 1219A, 2013 NY Slip Op 50156[U], \*3 [Sup Ct, Sullivan County 2013] [“Pursuant to the New York Lien Law, a mechanic's lien is subordinate to a prior recorded mortgage.”]).

Borrower argues that the mechanics lien is of no effect since the Lienor failed to foreclose within the applicable statute of limitations, and thus, Borrower has cured the violation. A mechanic's lien is valid for one year from the date of filing, unless within that time an action is commenced to foreclose the lien or an extension for an additional one-year period is granted (Lien Law §§ 17, 19; *Naber Elec. Corp. v George A. Fuller Co., Inc.*, 62 AD3d 971, 972 [2d Dept 2009]; *Aztec Window & Door Mfg., Inc. v 71 Vil. Rd., LLC*, 60 AD3d 795, 796 [2d Dept 2009]). Pursuant to Abeco's Answer, a lien was filed on or about June 18, 2020, and subsequently extended (NYSCEF 97). This action for foreclosure was filed in April 2022 (NYSCEF 1).

However, contrary to Borrower's arguments, if at the time a mortgage foreclosure action is commenced, a mechanic's lien is valid and the lienor is named as a party defendant, then the lien will come under the “protective umbrella” of the foreclosure action, and the lienor need not commence their own foreclosure actions or serve cross complaints in the mortgage foreclosure action (*see NYCTL 1997-1 Tr. v Stell*, 184 AD3d 9, 15 [2d Dept 2020] [“holders of mechanic's liens, who had been made party defendants in a mortgage foreclosure action, were not required to commence their own foreclosure actions or serve cross complaints in the mortgage foreclosure action in order to participate in a surplus money proceeding”]; *Application of Lycee Francais De New York*, 26 Misc 2d 374, 382 [Sup Ct, NY County, Special Term 1960] [“[I]n order for a defendant's lien to come under the protective umbrella of another's foreclosure action, as provided in section 17 of the Lien Law, the defendant's lien must, at the time of the

commencement of the suit, be valid and in force”]). Here, as alleged by Abeco (who has not responded to this motion), the mechanic’s lien was extended—and by statute, extensions are for an additional one-year period (here, until June 18, 2022). No party has put forth evidence to raise an issue of fact as to that extension. Thus, the Mechanic’s Lien is not void due to the statute of limitations because the mortgage foreclosure action was commenced while the Mechanic’s Lien was valid, and Abeco was named as a party defendant.

Therefore, Borrower’s arguments that Plaintiff’s motion should be denied since the claimed subordinate lien is no longer in existence are unavailing.

***C. Plaintiff has Established that Default Judgments Against the Defaulted Defendants Should be Entered.***

Lender has submitted an affirmation establishing that the New York City Department of Finance, New York State Department of Finance and Taxation and New York City Environmental Control Board (collectively, the “Defaulted Defendants”) were duly served with the Summons and Complaint and have failed to answer or otherwise appear in this action (*see* NYSCEF 86 [“Quaglia Aff.”] ¶¶ 6, 10; NYSCEF 94 [Affidavits of Service]). As demonstrated in Section A, Lender has also established an undisputed *prima facie* case entitling it to summary judgment of foreclosure by producing the Notes, the Mortgage and evidence of Borrower’s default under the Loan Documents (*see Bermudez*, 175 AD3d at 668). Accordingly, Lender is entitled to the entry of default judgment as against the Defaulted Defendants.

Further, Lender’s request to amend the caption of this action to strike the names of the fictitious defendants “John Does 1 through 10” is granted. Lender submits that none of these defendants has been identified or served with process, and Lender has ascertained that no parties other than the defendants previously served have rights in the Property that would be affected by

this action (*see* Quaglia Aff. ¶ 11; *Neighborhood Hous. Servs. of NY City, Inc. v Meltzer*, 67 AD3d 872, 874 [2d Dept 2009] [holding that excising John Doe defendants in foreclosure action is proper where “none of the John Doe defendants had been identified or served with process.”]).

***D. Plaintiff Has Stated a Claim against Defendant Jack Terzi on the Guaranty.***

Finally, Defendant Terzi’s cross-motion is denied. Plaintiff properly named Mr. Terzi as a defendant in this action to preserve its potential post-foreclosure deficiency judgment claim against him, alleging that he is “named as a defendant to adjudicate any deficiency judgment or any other amounts owed on account of Guarantor’s liability and obligations under the Guaranty” (NYSCEF 1 [Compl.] ¶6; *La Jolla Bank, FSB v Whitestone Jewels, LLC*, 2011 NY Slip Op 33362[U], \*7 [Sup Ct, Queens County 2011] [“A mortgagee that fails to name a guarantor as a defendant in a mortgage foreclosure proceeding could lose the right to seek a deficiency judgment against the guarantor. Thus naming Guarantors as defendants to this foreclosure action is an acceptable way to preserve any deficiency judgment claim that plaintiff may have against the Cohen brothers as Guarantors arising from their obligations under the Guaranty”]; *LBUBS 2005-C2 New York Retail, LLC v AC I Southwest Broadway LLC*, 2013 WL 1796712 [Sup Ct, NY County 2013] [“Plaintiffs are required to name [the guarantors] as defendants in order to preserve any possible deficiency claims against them”]).

To the extent Lender seeks to hold Mr. Terzi personally liable to Plaintiff for legal costs and expenses (including reasonable attorneys’ fees) incurred, pursuant to Section 10.1(i) of the Loan Agreement, Plaintiff would have to seek leave to amend its complaint to seek such relief against him (*Wells Fargo Bank, N.A. v 576 Fifth Ave. LLC*, 2010 NY Slip Op 31858[U], \*3 [Sup Ct, NY County 2010] [“In the event that [a triggering] event should occur prior to the issuance of a judgment of sale and foreclosure, the plaintiff may at that time seek leave to amend its

complaint so as to assert a claim for a deficiency judgment.”)], rather than simply requesting it in its reply brief.

### CONCLUSION

Based on the foregoing, Plaintiff is entitled to a judgment of foreclosure and sale and the Court grants Plaintiff's motion for summary judgment and appoints a referee to compute the amount due to Lender under the Loan Documents, including Lender's fees, costs, and expenses (*see* Stmt. ¶ 39; Mortgage § 10[h]; Loan Agreement § 10.3[b]). The branch of the motion seeking a default judgment against the above-mentioned defaulting defendants is granted without opposition. The branch of the motion seeking to amend the caption is granted, without opposition. The cross-motion to dismiss the Complaint against Terzi is denied.

The Defaulting Defendants may seek a vacatur of the instant default judgment if they can satisfy the requirements of CPLR § 5015, CPLR § 317, or any other relevant law.

Accordingly, it is

**ORDERED** that Plaintiff's motion for summary judgment is **GRANTED**; and the branch of the motion seeking a default judgment against the Defaulting Defendants is **GRANTED**, and the branch of the motion seeking to amend the caption is **GRANTED**; it is further

**ORDERED** that Defendant Jack Terzi's cross-motion to dismiss is **DENIED**; it is further

**ORDERED** this matter is directed to an Inquest before a Special Referee who shall hear and make a recommendation to the Court as to the amount due to Lender; it is further

**ORDERED** that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

**ORDERED** that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or [spref@courts.state.ny.us](mailto:spref@courts.state.ny.us)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh) at the “Local Rules” link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

**ORDERED** that Plaintiffs’ counsel shall serve a copy of this order with notice of entry on Defendants within five days and that counsel for Plaintiffs shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/1jd/suptctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

**ORDERED** that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

**ORDERED** that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion; it is further

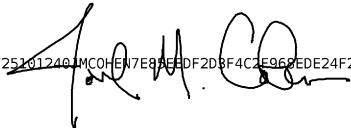
**ORDERED** that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk’s Office, along with an amended caption, who are directed to mark the court’s records to reflect the parties being removed pursuant hereto; it is further

**ORDERED** that such service upon the County Clerk and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website).

This constitutes the Decision and Order of the Court.

7/25/2023

DATE



JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: