SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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WOODLAWN, LLC,A NEVADA LIMITED LIABILITY COMPANY,

Plaintiff,

- v -

JESAND, LLC,ANDREA MANAFORT, BOARD OF MANAGERS OF BAXTER STREET CONDOMINIUM, JOHN DOE, JANE DOE, XYZ CORP.

Defendant.

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INDEX NO. 850144/2022

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 92, 93, 94, 95, 96

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

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 residential real property located 123 Baxter Street, Unit 5D, New York, New York. The mortgage, dated August 7, 2017, was given by Defendant Jesand, LLC ("Jesand") to Plaintiff and secures a loan with an original principal amount of $1,025,000.00 which is memorialized by a note of the same date. The note and mortgage were executed by non-party Kathleen B. Manafort as Sole Member and Managing Member of Jesand.

Defendant Jesand defaulted in repayment under the note and the parties executed a forbearance agreement, dated June 3, 2021, wherein Jesand reaffirmed the loan documents, acknowledged its default as well as the indebtedness. Non-party Paul Manafort also executed the document as a guarantor. Plaintiff commenced this action by filing a summons and verified complaint wherein it is alleged that Jesand defaulted in repayment under the loan documents and forbearance agreement. Defendants Jesand and Andrea Manafort ("Manafort") filed a timely, but unverified, answer containing seventeen [17] affirmative defenses and three purported counterclaims. Plaintiff filed a rejection of the answer the same day. Some fifteen [15] days later, Defendants filed an answer with a verification signed by Kathleen D. Manafort which Plaintiff also rejected.

Now, Plaintiff moves for a default judgment against Defendants Jesand and Manafort, or in the alternative, summary judgment against these defendants, striking the answer and affirmative defenses, a default judgment against all non-appearing parties, to appoint a Referee to compute, and to amend the caption. Defendants oppose the motion and cross-move pursuant to CPLR §3215 for a default judgment against Plaintiff, "Declaring Plaintiff Woodlawn, LLC to be proceeding in bad faith and providing applicable sanctions inclusive of the waiver of interest, penalties and counsel fees . . . Requiring the parties to attend a settlement conference and compelling Plaintiff Woodlawn, LLC to negotiate in good

faith . . . [and] Setting a conference with the Court for the purpose of establishing a discovery schedule". Plaintiff opposes the cross-motion.

The branch of the motion for a default judgment against Defendants Jesand and Manafort is denied despite the initial answer being unverified. As Plaintiff has not demonstrated it incurred any prejudice because of this defect, the Court is authorized to ignore same (*see* CPLR §3026; *Duerr v 1435 Tenants Corp.*, 309 AD2d 607 [1st Dept 2003]).

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 U.S. Bank, N.A. v James,* 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting 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]). In support of the motion, 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 Keith Berglund ("Berglund"), a Managing Member of Plaintiff. Berglund claims his affidavit was made based upon his personal knowledge of the stated facts and circumstances and Plaintiff's 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"]). Berglund's affidavit laid a proper foundation for the admission of Plaintiff's the records of into evidence under CPLR §4518 (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). Further, annexed to the motion were records referenced by Berglund (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

Berglund's affidavit and the referenced documents sufficiently evidenced the note and mortgage. As to the Mortgagor's default, it "is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form" (*Deutsche Bank Natl. Trust Co. v McGann*, 183 AD3d 700, 702 [2d Dept 2020]). Here, Berglund's review of the attached account records demonstrated that the Mortgagor defaulted in repayment under the note (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]). The indebtedness and default were also established based on the terms of the forbearance agreement (*see Redrock Kings, LLC v Kings Hotel, Inc.*, 109 AD3d 602 [2d Dept 2013]; *EMC Mortg. Corp. v Stewart*, 2 AD3d 772 [2d Dept 2003]).

In opposition, Defendants' claim that Plaintiff failed to demonstrate entitlement to summary judgment is without merit. All Defendants' other claims are defective as the opposition is supported solely by affirmations from their counsel who did not demonstrate personal knowledge of the facts underlying those defenses (*see eg Prince v Accardo*, 54 AD3d 837, 838 [2d Dept 2008]). Even if the affiants had personal knowledge, an issue of fact on the claim of bad faith was not shown as the affirmations were "conclusory, self-serving, facially unpersuasive evidence" and not supported by documentary proof which is insufficient to defeat summary judgment where evidence of Defendants'

acceptance of the disputed funds and failure to make repayment is proffered (*see Connecticut Nat'l Bank v Hack*, 186 AD2d 387, 388 [1st Dept 1992]; *Silver v Silver*, 17 AD3d 281 [1st Dept 2005]).

Defendants' assertion the motion must be denied because no discovery has been conducted is unavailing as they have offered nothing more than speculation to support that Plaintiff is in exclusive possession of facts to support its bad faith/breach of contract claims (*see Island Fed. Credit Union v I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]).

As to the branch of the 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, which is directed 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 second, fifth, tenth, eleventh, twelfth, thirteenth and fourteenth affirmative defenses claiming unclean hands, lack of capacity, waiver, estoppel, laches, contractual breach, and parol evidence 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 third and seventeenth affirmative defenses alleging Plaintiff lacks the capacity to prosecute this action as it is an unlicensed foreign entity is factually incorrect and belied by the documentary evidence. In any event, this type of deficiency is curable as Limited Liability Company Law §808[a] only effects a suspension of the ability to prosecute an action "unless and until such limited liability company shall have received a certificate of authority in this state" (*cf. 1700 First Ave. LLC v Parsons-Novak,* 46 Misc. 3d 30, 32 [App Term 1st Dept 2014]; *Acquisition Am. VI, LLC v Lamadore*, 5 Misc. 3d 461, 462 [Sup Ct NY Cty 2004]).

The fourth affirmative defense which claims Plaintiff lacks standing to prosecute this action is meritless. It is undisputed that when this action was commenced, Plaintiff, as the original lender, was in direct privity with the borrower Defendant (*see generally Wilmington Sav. Fund Socy., FSB v Matamoro*, 200 AD3d 79, 90-91 [2d Dept 2021]).

The sixth and fifteenth 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 seventh 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 also not a viable defense to summary judgment (*see eg 1855 E. Tremont Corp. v Collado Holdings LLC,* supra).

The eighth 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 ninth affirmative defense claiming "Plaintiff failed [to] timely and properly to exhaust all necessary statutory, and/or jurisdictional prerequisites to commence this action" is patently defective as it fails to specifically identify the legislation relied upon (*see One W Bank, FSB v Rosenberg*, 189 AD3d 1600, 1602 [2d Dept 2020]).

The sixteenth affirmative defense fails for the reasons stated, infra.

Overall, Defendants' opposition to dismissal of the affirmative defenses was conclusory and, by failing to raise specific legal arguments in rebuttal, those affirmative defenses found insufficient 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]). Similarly, the counterclaims are insufficiently supported by proof that is admissible or meritorious and, therefore, does not bar relief to a plaintiff who is otherwise entitled to summary judgment (*see eg Brody v Soroka,* 173 AD2d 431 [2d Dept 1991]).

As to Defendants' cross-motion, the branch to dismiss pursuant to CPLR §3211[a][10] for failure to join the United States of America as a necessary Defendant is without merit. CPLR §1001[a] defines a necessary party as "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made Plaintiffs or Defendants." "In making the determination whether an absentee need be joined as an indispensable party, it must be decided if the proposed party has such an interest in the litigation that the court cannot settle the controversy without necessarily considering the interests of the proposed party" (*see Joanne S. v Carey*, 115 AD2d 4, 7 [1st Dept 1986]). "Moreover, dismissal for nonjoinder is a last resort . . . [and] the factors mentioned in CPLR 1001 (b) [must] tip overwhelmingly in favor of dismissal" (*JPMorgan Chase Bank, Natl. Assn. v Salvage*, 171 AD3d 438, 439 [1st Dept 2019]). In the absence of such a party, the preferred remedy is joinder of the missing party (*see NRZ Pass-Through Trust IV v Tarantola*, 192 AD3d 819 [2d Dept 2021]).

Article 13 of the Real Property Actions and Proceedings Law defines necessary, representative, and permissive defendants to a foreclosure action (RPAPL §§1311, 1312, 1313). Here, Defendants have

not demonstrated what interest the United States of America presently has in this property, much less that its presence is indispensable. At most, Defendants have shown the United States of America is a necessary or permissible party (*cf. JP Morgan Chase Bank, N.A. v White*, 182 AD3d 469 [1st Dept 2020]) and the failure to join it simply renders it interest unaffected by any judgment of foreclosure and sale (*see eg HSBC Bank USA, N.A. v Proctor*, 190 AD3d 603 [1st Dept 2021]). As such, should Defendants believe they require relief against the United States of America, then they may, if appropriate, attempt to implead it as a party (*see Eclair Advisor Ltd. v Jindo Am., Inc.*, 39 AD3d 240 [1st Dept 2007]).

The branches of the cross-motion which rely on CPLR §3408 fail as that statute is inapplicable in this case. "CPLR §3408 only mandates a settlement conference in a residential foreclosure action involving a 'home loan' as defined by RPAPL §1304, and when the 'defendant is a resident of the property subject to foreclosure'" as defined in CPLR §3408[a][1] (*Richlew Real Estate Venture v Grant* 131 AD3d 1223 [2d Dept 2015]; *see also* CPLR §3408; *JP Morgan Chase Bank, N.A. v Venture*, 148 AD3d 1269 [3d Dept 2017]). RPRPL §1304 defines a "home loan" as one where the "borrower is a natural person" (*see* RPAPL §1304[6][a][1][i]). Here, the borrower is a limited liability company which is not a natural person under the statute (*see Bernstein v Dubrovsky*, 169 AD3d 410 [1st Dept 2019]; *Independence Bank v Valentine*, 113 AD3d 62 [2d Dept 2013]) nor is it a resident of the premises (*see Roys Realty Group, LLC v. Eighth Ave.*, ___Misc3d___, 2022 NY Slip Op 32678[U][Sup Ct NY Cty 2023]). Since RPAPL §1304 is inapplicable (*see 72nd Ninth LLC v 753 Ninth Ave Realty LLC*, 168 AD3d 597 [1st Dept 2019], compliance with CPLR §3408 was not required (*see 2013 Funding LLC v Park 91 LLC*, ___Misc3d___, 2013 NY Slip Op 32941[U][Sup Ct NY Cty 2013]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted (*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 the caption is granted (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that Plaintiff is awarded summary judgment against the appearing parties and a default judgment against the non-appearing defendants; and it is further

ORDERED that the cross-motion by Defendants Jesand and Manafort is denied in its entirety; and it is further

ORDERED that that **Elaine Shay, Esq., 800 3rd Avenue, Ste. 2800, New York, New York 10022 (212) 520-2690** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that in the discretion of the Referee, a hearing may be held, and testimony taken; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon

compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of $350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that if the Referee holds a hearing or is required to perform other significant services in issuing the report, the Referee may seek additional compensation at the Referee's usual and customary hourly rate; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee and to defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED the failure by defendants to submit objections to the referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee's report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and 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 at the address (www.nycourts.gov/supctmanh)]; and it is further

All parties are to appear for a virtual conference via Microsoft Teams on **December 14, 2023, at 10:20 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part

Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

8/16/2023
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			X	FIDUCIARY APPOINTMENT		REFERENCE