

Wilens v Unique Opportunity USA, Inc.

2023 NY Slip Op 34669(U)

June 15, 2023

Supreme Court, Bronx County

Docket Number: Index No. 814396/2021E

Judge: Fidel E. Gomez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

LAWRENCE M. WILENS, AS TO A 23.33% PARTICIPATION INTEREST, MICHAEL SUSSMAN AS TO A 23.33% PARTICIPATION INTEREST, KENNETH L. KAPLAN AS TO A 13.33% PARTICIPATION INTEREST, SALVATORE VICARI AS TO A 16.67% PARTICIPATION INTEREST, MICHAEL WEINRED AS TO A 3.34% PARTICIPATION INTEREST, AJK NY SRVICING AS TO A 13.33% PARTICIPATION INTEREST, LESLIE GRANOFF AS TO A 6.67% PARTICIPATION INTEREST,

Plaintiffs,

- against -

UNIQUE OPPORTUNITY USA, INC.; S.M. ABDUL HASAN; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF FINANCE; JOHN DOES AND JANE DOES AND XYZ CORPORATION 1-10 SAID NAMES BEING FICTITIOUS; PARTIES INTENDED BEING POSSIBLE TENANTS OR OCCUPANTS OF PREMISES, AND CORPORATIONS, OTHER ENTITIES OR PERSON WHO CLAIM OR MAY CLAIM A LIEN AGAINST THE PREMISES.,

Defendants.

Index No. 814396/2021E

Hon. FIDEL E. GOMEZ
Justice

The following papers numbered 1 to 5, Read on this Motion noticed of 5/30/23, and duly submitted as no. 2 on the Motion Calendar of 5/30/23.

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include: Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed (1), Answering Affidavit and Exhibits (3), Replying Affidavit and Exhibits (4), Notice of Cross-Motion - Affidavits and Exhibits, Pleadings - Exhibit, Stipulation(s) - Referee's Report - Minutes, Filed Papers- Order of Reference Judgment and Appointment of Referee to Compute (5), Memorandum of Law (2).

Nonparty's motion is decided in accordance with the Decision and Order appended hereto.

Dated: 6/15/2023

Hon. FIDEL E. GOMEZ, JSC (Signature)

- 1. CHECK ONE: [] CASE DISPOSED, [X] NON-FINAL DISPOSITION
2. MOTION/CROSS-MOTION IS: [X] GRANTED (MOTION), [] DENIED (MOTION), [] GRANTED IN PART, [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER, [] FIDUCIARY APPOINTMENT, [] SUBMIT ORDER, [] REFEREE APPOINTMENT, [] DO NOT POST, [] NEXT APPEARANCE DATE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X

**LAWRENCE M. WILENS, AS TO A 23.33%
PARTICIPATION INTEREST, MICHAEL
SUSSMAN AS TO A 23.33% PARTICIPATION
INTEREST, KENNETH L. KAPLAN AS TO A
13.33% PARTICIPATION INTEREST,
SALVATORE VICARI AS TO A 16.67%
PARTICIPATION INTEREST, MICHAEL
WEINRED AS TO A 3.34% PARTICIPATION
INTEREST, AJK NY SRVICING AS TO A 13.33%
PARTICIPATION INTEREST, LESLIE GRANOFF
AS TO A 6.67% PARTICIPATION INTEREST**

Plaintiffs,

-against-

**DECISION AND ORDER
Index No. 814396/2021E**

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HASAN; NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK STATE
DEPARTMENT OF FINANCE; JOHN DOES AND
JANE DOES AND XYZ CORPORATION 1-10
SAID NAMES BEING FICTITIOUS; PARTIES
INTENDED BEING POSSIBLE TENANTS OR
OCCUPANTS OF PREMISES, AND
CORPORATIONS, OTHER ENTITIES OR PERSON
WHO CLAIM OR MAY CLAIM A LIEN AGAINST
THE PREMISES,**

Defendants.

-----X

In this action to foreclose on a mortgage and sell the real property it encumbers, nonparty TLOA Mortgage, LLC (TLOA), successor-in-interest to the named plaintiffs, moves seeking an order, *inter alia*, substituting TLOA as the named plaintiff, dismissing Defendants' affirmative defenses, and granting it summary judgment. TLOA contends that summary judgment is warranted because it holds the note executed by defendant UNIQUE OPPORTUNITY USA (Unique), obligating it to repay a loan, that it was assigned the mortgage executed by Unique, which pledged real property as collateral for the loan, and that Unique has defaulted under the

terms of the note and mortgage. Unique and its President SM Abdul Hasan (collectively Defendants) oppose the motion asserting that TLOA has no standing because it did not have legal or equitable interest in the note or mortgage at the time the foreclosure action was commenced.

For the reasons which follow hereinafter, TLOA's motion is granted.

BACKGROUND

The complaint, filed on October 19, 2021, alleges that on February 5, 2019, Unique executed a mortgage note (the Note) between itself and nonparty MW Lending LLC (MW) in the amount of \$150,000 evidencing a loan by MW to Unique. On that same date, as security for repayment of the Note, Unique executed a mortgage (the Mortgage), which pledged premises located at 2932 Holland Avenue, Bronx, NY 10467 (the Property) as security, and Unique's President, SM Abdul Hasan (Hasan) executed a Guaranty of Payment of Unique's indebtedness (the Guaranty). On the foregoing date, the Mortgage was assigned from MW to Plaintiffs herein by assignment of mortgage and the Note was assigned to Plaintiffs by allonge. Plaintiffs allege that they own and hold the Note, Mortgage and all of the other underlying instruments, documents or agreements otherwise evidencing or securing the loan. On April 1, 2020, Unique failed to make a payment due under the Note and Mortgage. By letter dated January 15, 2021, Plaintiffs accelerated the Loan as of January 15, 2021 and duly demanded payment of the outstanding indebtedness pursuant to the loan documents.

MOTION FOR SUMMARY JUDGMENT

TLOA's motion seeking summary judgment on its cause of action to foreclose on the Mortgage and for the sale of the Property is granted to the extent of appointing a referee to compute all sums due to TLOA under the note and mortgage. Significantly, TLOA establishes that, by assignment, it currently holds the note and mortgage, both executed by Unique, and that Unique defaulted under the terms of the note and mortgage. TLOA was also assigned the guaranty executed by Hasan.

Standard of Review

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds*; *Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]). Notably, the court can consider otherwise inadmissible evidence, when the opponent fails to object to its admissibility and instead relies on the same (*Niagara Frontier Tr. Metro Sys. v County of Erie*, 212 AD2d 1027, 1028 [4th Dept 1995]), or when the opponent fails to object to the admission of such evidence (*Bank of New York Mellon v Gordon*, 171 AD3d 197, 202 [2d Dept 2019] ["However, as a general matter, a court should not examine the admissibility of evidence submitted in support of a motion for summary judgment unless the nonmoving party has specifically raised that issue in its opposition to the motion."]; *see Greene v Kevin D. Greene, LLC*, 188 AD3d 1012, 1013 [2d Dept 2020]; *Rosenblatt v St. George Health and Racquetball Assoc., LLC*, f119 AD3d 45, 55 [2d Dept 2014] ["Thus, the Supreme Court erred when it, sua sponte, determined that the plaintiff's deposition transcript was inadmissible because of the lack of a certification and, as a result, concluded that Eastern Athletic had failed to meet its prima facie burden."]). The latter is premised on the well settled principal that a court ought not raise arguments never raised by the parties themselves (*Misicki v Caradonna*, 12 NY3d 511, 519 [2009] ["We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made."]).

Once a movant meets its initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial on any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case (*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, s/he must proffer an excuse for failing to submit evidence in admissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

When deciding a summary judgment motion the role of the court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

[s]upreme court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial (see also *Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the court's function when

determining a motion for summary judgment is issue finding, not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]), When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

In a foreclosure action, plaintiff establishes *prima facie* entitlement to summary judgment by submitting proof of a note, a mortgage, and defendant's default or failure to pay the same (*Barcy Investors, Inc. v Sun*, 239 AD2d 161, 161 [1st Dept 1997]; *Chemical Bank v Broadway 55-56th St. Assoc.*, 220 AD2d 308, 309 [1st Dept 2005]; *Federal Home Mortgage Corp. v Karastathis*, 237 AD2d 558, 558 [2d Dept 1997]; *DiNardo v Patcam Service Station Inc.*, 228 AD2d 543, 543 [2d Dept 1996]). Once plaintiff demonstrates *prima facie* entitlement to summary judgment, it is then incumbent upon defendant to demonstrate a viable defense which creates an issue of fact, thereby precluding summary judgment (*id.*). When there is no issue as to defendant's default and the only issue is as to the amount actually owed, summary judgment must nevertheless be granted (*Crest/Good Manufacturing Co., Inc. v Baumann*, 160 AD2d 831, 831-832 [2d Dept 1990]; *Johnson v Gaughan*, 128 AD2d 756, 757 [2d Dept 1987]). Any dispute as to the amount owed is to be resolved after summary judgment is granted pursuant to RPAPL § 1321 (*id.*).

In addition to the foregoing, it is also well settled that since "foreclosure of a mortgage may not be brought by one who has no title to it" (*Lasalle Bank Natl. v Ahearn*, 59 AD3d 911, 912 [3d Dept 2009] [internal quotation marks omitted]), plaintiff in a foreclosure action must therefore establish that it has legal or equitable interest in the mortgage, such that it has standing to foreclose on the mortgage when an action is commenced (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 636, 637 [2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 637 [2d Dept 2011]). Thus, when a defendant raises the issue of plaintiff's standing, plaintiff must prove its standing to be accorded relief (*U.S. Bank National Assoc. v Dellarmo*, 94 AD3d 746, 748 [2d Dept 2012]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2d Dept 2011]).

A plaintiff in a mortgage foreclosure action has standing to bring suit when it is “both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced” (*Dellarmo* at 748 [internal quotation marks omitted]; *Weisblum* at 108; *Barnett* at 637; *Silverberg* at 279; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2d Dept 2009]). Neither the assignment of a note nor of a mortgage need be in writing and merely the transfer of those instruments, meaning physical delivery, confers title upon an assignee and, therefore, also confers standing (*Flyer v Sullivan*, 284 AD 697, 699 [1954]; *Dellarmo* at 748; *Barnett* at 637; *Silverberg* at 280; *Weisblum* at 108; *Ahearn* at 912). Insofar as the mortgage is merely security for the note, namely the debt, assignment of a note also effectuates assignment of the mortgage (*Dellarmo* at 748; *Silverberg* at 280). However, assignment of the mortgage does not, by itself, result in the assignment of the note (*id.*). Thus, the assignment of a mortgage without the concomitant assignment of the note is a nullity (*Flyer* at 698; *Merrit v Bartholick*, 9 Tiffany 44, 45 [1867]; *Dellarmo* at 749; *Collymore* at 754).

To the extent that standing to foreclose on a mortgage is required at the time an action is commenced, where standing is absent at the time of commencement, such shortcoming cannot be cured by retroactive assignment occurring after an action is commenced (*Countrywide Home Loans v Gress*, 68 AD3d 709, 710 [2d Dept 2009] [“a retroactive assignment cannot be used to confer standing upon the assignee in a foreclosure action commenced prior to the execution of the assignment.”]; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 210 [2d Dept 2009] [“If an assignment is in writing, the execution date is generally controlling and written assignment claiming an earlier effective date is deficient unless it is accompanied by proof that the physical delivery of the note and mortgage was, in fact, previously effectuated.”] [internal quotation marks omitted]; *Ahearn* at 912 [same]). In the event that a note and mortgage are validly assigned to a third party subsequent to the commencement of a foreclosure action, the assignee can continue an action in the name of the original mortgagee, even in the absence of a formal substitution (CPLR § 1018; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, 1001 [2d Dept 2015]; *Lincoln Sav. Bank, FSB v Wynn*, 7 AD3d 760, 761 [2004]). CPLR § 1018 provides that “[up]on any transfer of interest, the action may be continued by or against the original parties

unless the court directs the person to whom the interest is transferred to be substituted or joined in the action” (*id.*). Nonetheless, an assignee may, if it chooses, take the steps necessary to effect a formal substitution (*Brighton BK, LLC* at 1001).

RPAPL § 1311(1) states that in an action sounding in foreclosure a necessary defendant is, *inter alia*,

[e]very person having an estate or interest in possession, or otherwise, in the property as tenant in fee, for life, by the curtesy, or for years, and every person entitled to the reversion, remainder, or inheritance of the real property, or of any interest therein or undivided share thereof, after the determination of a particular estate therein.

Since the objective of a foreclosure action is “to extinguish the rights of redemption of all those who have a subordinate interest in the property and to vest complete title in the purchaser at the judicial sale” (*6820 Ridge Realty LLC v Goldman*, 263 AD2d 22, 26 [2d Dept 1999] [internal quotation marks omitted]; *Polish Nat. All. of Brooklyn, U.S.A. v White Eagle Hall Co., Inc.*, 98 AD2d 400, 404 [2d Dept 1983]), it is well settled that tenants residing at the premises sought to be sold at foreclosure are necessary parties in an action to foreclose a mortgage (*6820 Ridge Realty LLC* at 25; *see 1426 46 St., LLC v Klein*, 60 AD3d 740, 742 [2d Dept 2009]; *Flushing Sav. Bank v CCN Realty Corp.*, 73 AD2d 945, 945 [2d Dept 1980]). The failure to join a necessary party in a foreclosure action leaves that party’s rights unaffected and the sale at foreclosure void as to that party (*Polish Nat. All. of Brooklyn, U.S.A.* at 406; *1426 46 St., LLC v Klein* at 742; *6820 Ridge Realty LLC* at 26).

RPAPL § 1321(1) states that

[i]f the defendant fails to answer within the time allowed or the right of the plaintiff is admitted by the answer, upon motion of the plaintiff, the court shall ascertain and determine the amount due, or direct a referee to compute the amount due to the plaintiff and to such of the defendants as are prior incumbrancers of the mortgaged premises, and to examine and report whether the mortgage premises can be sold in parcels and, if the whole amount secured by the mortgage has not become due, to report the amount thereafter to become due.

Thus, on an application for an order of reference, a plaintiff establishes entitlement to said relief when it submits “the mortgage, the unpaid note, the complaint, other proof setting forth the facts establishing the claim, an affidavit of an individual authorized to act on its behalf attesting to the default on the note, and proof that the defendants failed to answer within the time allowed” (*Household Fin. Realty Corp. of New York v Adeosun-Ayegbusi*, 156 AD3d 870, 871 [2d Dept 2017]; *Lasalle Bank Nat. Ass’n v Jagoo*, 147 AD3d 746, 746 [2d Dept 2017]; *John T. Walsh Enterprises, LLC v Jordan*, 152 AD3d 755, 756 [2d Dept 2017]; *US Bank Nat. Ass’n v Singer*, 145 AD3d 1057, 1058 [2d Dept 2016]).

Despite the language in RPAPL § 1321(1), which limits the appointment of a referee to actions where the mortgagee defaults in the plenary action or where the same admits plaintiff’s right to foreclose on the mortgage in an answer, courts routinely appoint referees pursuant to RPAPL § 1321 in cases where the mortgagor is awarded the right to foreclose upon a motion for summary judgment (*Excel Capital Group Corp. v 225 Ross st. Realty, Inc.*, 165 AD3d 1233, 1233-1234 [2d Dept 2018] [In an action for foreclosure and sale, the court appointed a referee to compute after granting plaintiff’s motion for summary judgment.]; see *Deutsche Bank Natl. Tr. Co. v Logan*, 183 AD3d 660, 661-663 [2d Dept 2020] [same]; *U.S. Bank N.A. v Calabro*, 175 AD3d 1451, 1451 [2d Dept 2019] [same]; *Deutsche Bank Nat. Tr. Co. v Logan*, 146 AD3d 861, 861 [2d Dept 2017] [same]).

A guaranty agreement must be strictly construed (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]; *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 592 [2015]). Summary judgment seeking an order enforcing a guaranty is warranted upon proof of “the existence of the guaranty, the underlying debt and the guarantor’s failure to perform under the guaranty” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A.* at 492; *Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]; *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]).

Discussion

In support of its motion, TLOA submitted, *inter alia*, the affidavit and attached exhibits of Linda Salamon, one of its servicing agents, wherein she states as follows: On or about

February 5, 2019, Unique duly executed and delivered to MW a mortgage note in the principal amount of \$150,000 plus interest. On the same date, Unique duly executed and delivered to MW a mortgage for the purpose of securing payment for said indebtedness. As further security for the mortgage loan, on or about February 5, 2019, Unique executed and delivered to MW an Assignment of Rents and Leases (the ALR). The note and mortgage were assigned to Plaintiffs herein on or about February 5, 2019 by delivering the note with indorsement to Plaintiffs by Assignment of Mortgage (the First AOM). Thereafter, the note and mortgage were assigned by Plaintiffs to TLOA by delivering the note with indorsements to TLOA by Assignment of Mortgage (the Second AOM) on or about February 4, 2022. The Note, Mortgage, ALR, Guaranty, First AOM, and Second AOM hereinafter are at times referred to collectively as the Loan Documents. TLOA is presently in possession of the note with proper indorsement and/or allonge and therefore has proper standing to maintain this action. TLOA has been in possession of the note with proper indorsement since February 4, 2022, when the note and allonge were delivered to TLOA. Unique defaulted on the note by failing to pay the sums due on the maturity date of the loan on March 1, 2020. The note and mortgage provide for the ability of the note holder to commence a foreclosure action upon an Event of Default. Failure to pay the amounts due under the loan on or before the Maturity Date is an Event of Default. Pursuant to paragraph 4 of the mortgage, the note holder is not required to send a default and/or acceleration notice. Notwithstanding, Plaintiffs served an acceleration notice dated January 15, 2021 on Unique and Hasan. All sums due under the loan and Loan Documents became due upon Plaintiff accelerating the amounts due under the loan. Unique failed to cure its default and the instant foreclosure action was commenced.

TLOA submits the documents referenced by Salamon and by the complaint.¹

¹TLOA, via Salamon's affidavit, laid a foundation for the admission of all exhibits as TLOA's business records. Indeed, records can generally be admitted for consideration at trial or on a motion upon a proper foundation that the same are business records – namely, that (1) the record be made in the regular course of business; (2) it is the regular course of business to make said record and; (3) the records were made contemporaneous with the events contained therein (CPLR § 4518; *People v Kennedy*, 68 NY2d 569, 579 [1986]). Here, Salamon sufficiently laid the foregoing foundation for any records created by TLOA. Moreover, by also stating that “[i]n

First, TLOA submits the Note, dated February 5, 2019, which evinces that MV loaned Unique \$150,000, payable in eleven (11) monthly installments of interest only in the amount of \$1,500, commencing on April 1, 2019 until March 1, 2020 (the Maturity Date), when the entire unpaid principal balance of \$150,000 together with all accrued and unpaid interest thereon shall be paid in full. Failure to make a timely monthly installment payment constitutes an event of default under the Note. Allonges attached to the Note reflect that the Note was assigned to Plaintiffs on February 5, 2019 and that, effective February 4, 2022, the Note was assigned by Plaintiffs to TLOA.

Second, TLOA submits the Mortgage, dated February 5, 2019, which incorporates the Note by reference, and wherein the Property is pledged as security for the Note. The Mortgage indicates that a default under the Note shall be deemed a default under the Mortgage entitling the mortgagee to accelerate the debt secured under the Mortgage and to foreclose the lien of the Mortgage.

Third, TLOA submits a Collateral Assignment of Leases and Rents (the ALR), dated February 5, 2019, which evinces that as a condition to making the \$150,000 loan to Unique, MW required Unique to assign to it all of the “rents, profits and issues due and to become payable” from the Property, “together with all the documents, leases, agreements, service contracts and insurance policies affecting” the Property.

Fourth, TLOA submits the Guaranty, dated February 5, 2019, wherein Hasan agrees to guarantee Unique’s obligations under the Note and Mortgage.

the event these loan records were created by prior servicers or owners of the loan, those records have been integrated into TLOA’s business records and verified according to TLOA’s policies and procedures and are kept and relied upon as a regular business practice and in the ordinary course of business of TLOA,” she laid a foundation for the admission of those third-party records, not created by TLOA, such as records created by Plaintiffs, MW, Unique and Hasan, such as their assignment and guaranty documents. To be sure, the records of a third-party, while not generally admissible business records of another party, are admissible when the third-party’s records were used in the preparation of the proponent’s business records such that they are fully incorporated into the proponent’s business records (*Andrew Carothers v M.D., P.C.* at 864-65; *Plymouth Rock Fuel Corp. v Leucadia, Inc.*, 117 AD2d 727, 728 [2d Dept 1986]; *see also People v DiSalvo*, 284 AD2d 547, 548 [2d Dept 2001]).

Fifth, TLOA submits two Assignments of Mortgage (AOM) evincing assignment of the Mortgage. The First AOM is dated February 5, 2019 and evinces that MW assigned the Mortgage to Plaintiffs. The Second AOM is dated February 4, 2022 and evinces that Plaintiffs assigned the mortgage to TLOA.

Sixth, TLOA submits the acceleration letter, dated January 15, 2020,² wherein MW advised Unique and Hasan that the Note and Mortgage matured on March 1, 2020, at which time all principal and interest became due. Demand was made for a total amount due, including interest and late fees, of \$176, 318.85.

Notably, Salamon's affidavit and the exhibits appended to her affidavit establish that TLOA holds and owns the Note, Mortgage and Guaranty, which per the terms therein required repayment of the loan made to Unique. Per Salamon's affidavit, on March 1, 2020, Unique and Hasan failed to pay the sums due under the Note and Mortgage, which per the terms therein constituted a default thereunder. It is undisputed that Hasan executed and delivered a valid guaranty for the payment of the debt incurred by Unique and that Hasan failed to pay that debt. Thus, here, there is ample proof of the note, mortgage, and a default thereunder, thereby warranting summary judgment. With regard to standing, TLOA established that the loan documents were assigned to TLOA on February 4, 2022, after the foreclosure action was properly commenced by Plaintiffs against Unique and Hasan. Since the note and mortgage were validly assigned to TLOA subsequent to the commencement of the instant, properly commenced, foreclosure action, TLOA is entitled to continue this action in either the name of Plaintiffs herein or in its own name upon substitution as the named plaintiff in this action. (CPLR § 1018; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, 1001 [2d Dept 2015]; *Lincoln Sav. Bank, FSB* at 761).

Based on the foregoing, TLOA establishes *prima facie* entitlement to summary judgment on its cause of action for foreclosure on the mortgage and sale of the Property, as against Unique.

²While the letter is dated January 15, 2020, this appears to be a scrivener's error since the total amount due of \$176, 318.85 stated in the letter was calculated as of January 15, 2021.

Nothing submitted by Defendants raises a material issue of fact sufficient to preclude summary judgment.

The only evidence submitted by Unique and Hasan is an affidavit of the latter, wherein he states, to the extent relevant, that at the time this foreclosure action was commenced, TLOA did not have any interest in the note or mortgage; that note and mortgage were assigned to TLOA on February 4, 2022 and recorded on February 14, 2022; and that TLOA has no standing because TLOA did not have legal or equitable interest in the mortgage at the time the foreclosure action was commenced.

The foregoing, as well as the arguments raised by opponent's counsel in his affirmation in opposition, fail to raise a triable issue of fact sufficient to preclude summary judgment.

The only argument advanced by counsel in opposition is that TLOA lacks standing because the assignment of the note and mortgage to TLOA was executed after the commencement of the action for foreclosure. However, as discussed previously, when a note and mortgage are validly assigned to a third party subsequent to the commencement of a foreclosure action, as was the case here, the assignee can continue an action in the name of the original mortgagee, even in the absence of a formal substitution (CPLR § 1018; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, 1001 [2d Dept 2015]; *Lincoln Sav. Bank, FSB* at 761). Here, TLOA has established that the original plaintiffs were the holders of the note and mortgage at the time the action was commenced on October 20, 2021. TLOA also established that, on February 4, 2022, the original plaintiffs assigned the note and mortgage to TLOA by delivering the original note with proper indorsement and an assignment of mortgage. Moreover, as previously noted, CPLR § 1018 provides that “[up]on any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action” (*id.*). Further, an assignee may, if it chooses, take the steps necessary to effect a formal substitution (*Brighton BK, LLC* at 1001). As such, TLOA has standing to continue this foreclosure action against defendants.

To the extent that TLOA seeks to hold Hasan liable for a deficiency judgment based on the guaranty he executed, TLOA has demonstrated *prima facie* entitlement to summary

judgment. A deficiency judgment sought against a guarantor in a foreclosure action is “[merely] incidental to the principal relief demanded against the mortgagor” (*LibertyPointe Bank v 7 Waterfront Prop., LLC*, 94 AD3d 1061, 1062 [2d Dept 2012]; see *Dudley v Congregation of Third Order of St. Francis*, 138 NY 451, 458 [1893]), and here, as noted above, summary judgment and an order enforcing a guaranty is warranted upon proof of “the existence of the guaranty, the underlying debt and the guarantor’s failure to preform under the guaranty” (*Centrale Raiffeisen-Boerenleenbank, B.A.* at 492; *Davimos* at 272; *City of New York* at 71). Through Salamon’s affidavit, TLOA demonstrated the existence of the Guaranty, the underlying debt and Hasan’s failure to perform under the Guaranty.

Once again, Hasan’s affidavit, the only evidence submitted by Defendants, is insufficient to raise an issue of fact to preclude summary judgment.

MOTION TO DISMISS AFFIRMATIVE DEFENSES

With respect the affirmative defenses raised in Defendants’ answer, TLOA contends that all seven affirmative defenses should be stricken pursuant to CPLR § 3013 and CPLR § 3211(b) because they are conclusory, without merit, contradicted by documentary evidence and fail to raise an issue of fact. In their answer, Unique and Hasan raise seven affirmative defenses, namely: (1) the complaint fails to state a cause of action; (2) the foreclosure action is barred by laches; (3) the acceleration of the note and mortgage was improper and in violation of the agreement Defendants entered into with Plaintiffs; (4) Plaintiffs failed to comply with an agreed-upon condition precedent to commencement of a foreclosure proceeding; (5) lack of personal jurisdiction over Defendants due to lack of or improper service upon them; (6) the foreclosure action is barred by the doctrine of waiver and estoppel; and (7) Plaintiffs lacked standing at the time the action was commenced and were not lawful owners and holders of the note and mortgage.

Standard of Review

A party may move for judgment dismissing one or more defenses on the ground that a defense is not stated or has no merit (CPLR § 3211[b]). “When moving to dismiss an affirmative defense pursuant to CPLR § 3211(b), the plaintiff bears the heavy burden of showing

that the defense is without merit as a matter of law (*Alpha Capital Anstalt v General Biotechnology Corporation*, 191 AD3d 515, 515 [1st Dept 2021] [internal quotation marks omitted]). The allegations set forth in the answer must be viewed in the light most favorable to the defendant (*182 Fifth Ave. v Design Dev. Concepts*, 300 AD2d 198, 199 [1st Dept 2002]), and “the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed” (*534 E. 11th St. v Hendrick*, 90 AD3d 541, 542 [1st Dept 2011]). “Further, the court should not dismiss a defense where there remain questions of fact requiring a trial” (*Granite State Ins. Co. v Transatlantic Reinsurance Co.*, 132 AD3d 479, 481 [1st Dept 2015]). However, affirmative defenses which plead conclusions of law without supporting facts should be dismissed (*170 West Village Associates v G&E Realty, Inc.*, 56 AD3d 372, 372-373 [1st Dept 2008]; *Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.*, 35 AD3d 317, 319 [1st Dept 2006]; *Brody v Soroka*, 173 AD2d 431, 433 [2d Dept 1991]). In this regard, statements in a pleading must be “sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense” (CPLR § 3013). “Pleadings that are not particular enough to provide the court and the parties with notice of the transaction or occurrences to be proved must be dismissed” (*Sibersky v. New York City*, 270 AD2d 209, 209 [1st Dept 2000]).

Discussion

The complaint alleges one cause of action for the foreclosure on a mortgage and sale of the real property encumbered by the mortgage. Specifically, it is alleged that, at the time of commencement of this action, Plaintiffs were the owners and holder of the note, mortgage and other loan documents concerning the real property encumbered by the mortgage. It is also alleged that defendants defaulted on the loan and mortgage by not making the payment due on the maturity date. Further, as discussed above, through the affidavit of Salamon, TLOA submitted the note, mortgage and evidence of the default. As such, the complaint states a cause of action for the foreclosure on the mortgage and sale of the real property. Therefore, Defendants’ first affirmative defense is dismissed.

Defendants' second affirmative defense alleges that the action is barred by the doctrine of laches. Notably, the answer merely alleges that "Plaintiffs are not entitled to any legal or equitable remedy on the ground of lache[s]." Without any factual allegations to support this legal conclusion, this defense fails to meet the minimum pleading requirements set forth in CPLR § 3013. For this reason alone, this defense must be dismissed. In any event, "[l]aches is an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party" (*In re Linker*, 23 AD3d 186, 189 [1st Dept 2005] [internal quotation marks omitted]). "The mere lapse of time, without a showing of prejudice, is insufficient to sustain a claim of laches" (*id.*). In addition, there must be a change in circumstances making it inequitable to grant the relief sought (*Skrodelis v Norbergs*, 272 AD2d 316, 316 [2d Dept 2000]). Prejudice may be demonstrated "by a showing of injury, change in position, loss of evidence, or some other disadvantage resulting from the delay" (*id.* at 316-317). Here, Defendants have neither demonstrated nor alleged that there has been any significant delay in bringing the foreclosure action; nor have they demonstrated or alleged that they have been prejudiced in a manner which would make it inequitable to grant foreclosure and sale of the Property. For the foregoing reasons, Defendants' second affirmative defense is dismissed.

Defendants' third affirmative defense merely alleges that "Plaintiffs acceleration of the note and mortgage was improper and in violation of the agreement entered into between Plaintiffs and Defendants." This defense is bereft of any specific factual allegations as to how or why the acceleration of the note and mortgage was improper, or how it violated any agreement between Plaintiffs and Defendants. As such, it fails to meet the minimum pleading requirements of CPLR § 3013. Further, the Mortgage provides that a default under the Note shall be deemed a default under the Mortgage entitling the mortgagee to accelerate the debt secured under the Mortgage and to foreclose the lien of the Mortgage. The January 15, 2021 letter states that the Note and Mortgage matured on March 1, 2020, at which time all principal and interest became due. By the express terms of the Loan, Mortgage and Guaranty, Defendants agreed to pay the debt in full by March 1, 2020. The letter set forth the amount due and demanded payment thereof. For the foregoing reasons, Defendants' third affirmative defense is dismissed.

Defendants' fourth affirmative defense alleges that "Plaintiffs failed and neglected to comply with a condition precedent negotiated in respect to the Mortgage Note and Mortgage prior to the commencement of the foreclosure proceeding," and "[a]lso, failed to provide notice of the default." Here, the only alleged condition precedent that can be discerned from this language is an alleged failure to provide notice of the default. However, neither the Note nor the Mortgage required the issuance of a notice of default prior to commencing a foreclosure action. In any event, the January 15, 2021 letter served as said notice of default and was issued nine months before this foreclosure action was commenced. To the extent that Defendants' allege that another condition precedent negotiated by the parties was not complied with, the answer is bereft of any specific allegations as to the nature of that condition precedent and how it was not complied with, and, thus, fails to meet the minimum pleading requirements of CPLR § 3013. For the foregoing reasons, Defendants' fourth affirmative defense is dismissed.

Defendants' fifth affirmative defense alleges that the court lacks personal jurisdiction over them because of lack of service or improper service upon Defendants. However, as TLOA notes, an objection that the summons and complaint were not properly served "is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship" (CPLR § 3211[e]). Here, Defendants did not move for judgment on this ground and the court has not extended the time upon which Defendants may do so. Therefore, Defendants' fifth affirmative defense is dismissed.

Defendants' sixth affirmative defense alleges that this action is "barred by the doctrine of waiver and estoppel." First, to the extent that this allegation is merely a conclusion of law bereft of any factual allegations, it runs afoul of the minimum pleading requirements of CPLR § 3013. Further, "[a] proper pleading of waiver requires allegations inter alia that the adverse party was aware of certain facts and, being aware of them, elected not to take advantage of them" (*Glenesk v Guidance Realty Corp.*, 36 AD2d 852, 853 [2d Dept 1971]). Moreover, "to support the claim of estoppel, facts should be alleged showing in what manner and to what extent, defendant relied on plaintiff's inconsistent conduct and was prejudiced thereby" (*id.* at 853). Here, Defendants

do not allege any facts that Plaintiffs were aware of and elected not to take advantage of, or that show that Defendants relied upon any inconsistent conduct on the part of Plaintiffs and were prejudiced by such reliance. For the foregoing reasons, Defendants' sixth affirmative defense is dismissed.

Defendants' seventh affirmative defense alleges that Plaintiffs lacked standing to commence the instant action because they were not the holders or owners of the original note and mortgage and, were not, and are not, authorized by the lawful owners and holders to enforce the original note and mortgage. Here, the record evinces that MW was the original owner and holder of the Note and Mortgage and that the Note and Mortgage were validly assigned to Plaintiffs prior to the commencement of this action. The record also shows that the Note and Mortgage were duly assigned to TLOA after the action was commenced. As such, this defense lacks merit and is dismissed.

MOTION FOR DEFAULT JUDGMENT

TLOA's motion seeking an order entering a default judgment against all non-appearing defendants is granted. Significantly, TLOA establishes that all other defendants were served with the complaint, that the claims against them have merit, and that said defendants have failed to interpose answers.

Standard of Review

Pursuant to CPLR § 3215(f), "[o]n any application for judgment by default, the applicant shall file proof of service of the summons and complaint . . . and proof of the facts constituting the claim" (*Pampalone v Giant Building Maintenance, Inc.*, 17 AD3d 556, 557 [2d Dept 2005] [Default judgment granted once plaintiff submitted proof that defendant was served with the summons and complaint and an affidavit of the facts constituting the claim.]; *Andrade v Ranginwala*, 297 AD2d 691, 691-692 [2d Dept 2002]). Once the requisite showing has been made, a motion for a default judgment must be granted unless the defendant can establish a meritorious defense to the claims made, a reasonable excuse for the delay in interposing an answer, and that the delay in interposing an answer has in no way prejudiced the plaintiff in the

prosecution of the case (*Buywise Holding, LLC v Harris*, 31 AD3d 681, 683 [2d Dept 2006]; *Giovanelli v Rivera*, 23 AD3d 616, 616 [2d Dept 2005]).

Pursuant to CPLR § 3215(a), “[i]f the plaintiff’s claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default.” Accordingly, if the damages sought are not for a sum certain or for an amount which can be made certain, a default judgment is only as to liability, where the defendant admits all traversable allegations in the complaint as to liability only (*Rokina Optical Co., Inc. v Camera King, Inc.*, 63 NY2d 728, 730 [1984]; *Arent Fox Kinter Plotkin & Kahn, PLLC v Gmbh*, 297 AD2d 550, 590 [2d Dept 2002]). A trial on inquest must be held wherein the defendant is afforded an opportunity to present and try a case in mitigation of damages (*Rokina Optical Co., Inc.* at 730; *Arent Fox Kinter Plotkin & Kahn, PLLC* at 590). The term “sum certain” contemplates a situation where once liability has been established, “there can be no dispute as to the amount due, as in actions on money judgments and negotiable instruments” (*Reynolds Securities, Inc. v Underwriters Bank and Trust Company*, 44 NY2d 568, 572 [1978]).

With regard to establishing the merits of the claim, plaintiff may use an affidavit or a complaint verified by the plaintiff (*Mullins v DiLorenzo*, 199 AD2d 218, 220 [1st Dept 1993]; *Gerhardt v J&R Salacqua Contr. Co.*, 181 AD2d 719, 720 [2d Dept 1992]). Additionally, plaintiff can also use deposition testimony (*Empire Chevrolet Sales Corporation v Spallone*, 304 AD2d 708, 709 [2d Dept 2003]; *Ramputi v Timko Contracting Corp.*, 262 AD2d 26, 27 [1st Dept 1999]). While generally, a plaintiff cannot establish the merits of his or her claims using a complaint verified by an attorney (*DeLeon v Sonin & Genis*, 303 AD2d 291, 292 [1st Dept 2003]; *Juseinoski v Board of Education of the City of New York*, 15 AD3d 353, 356 [2d Dept 2002]), a complaint verified by an attorney, where the attorney has personal knowledge of facts constituting the claim, is sufficient to establish the merits of a plaintiff’s claim (*State Farm Mutual Automobile Insurance Company v Rodriguez*, 12 AD3d 662, 663 [2d Dept 2004]; *Martin v Zangrillo*, 186 AD2d 724, 724 [2d Dept 1992]).

CPLR § 3215 (c) states that

[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment

but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

Thus, a party who fails to take a default within a year after said default could have been taken, has abandoned his case and the remedy is dismissal (*Kay Waterproofing Corp. v Ray Realty Fulton, Inc.*, 23 AD3d 624, 625 [2d Dept 2005]; *Geraghty v Elmhurst Hosp. Center of New York City Health and Hospitals Corp.*, 305 AD2d 634, 634 [2d Dept 2003]). Significantly, pursuant to CPLR § 320(a), generally “[a]n appearance shall be made within twenty days after service of the summons.” In order to avoid dismissal under this section, a plaintiff must offer a reasonable excuse for the failure to timely move for a default and must also demonstrate the merits of the action (*Truong v All Pro Air Delivery, Inc.*, 278 AD2d 45, 45 [1st Dept 2000]; *LaValle v Astoria Construction & Paving Corp.*, 266 AD2d 28, 28 [1st Dept 1999]; *State Farm Mutual Automobile Insurance Company v Rodriguez*, 12 AD3d 662, 663 [2d Dept 2004]). Notably, in the absence of a motion seeking dismissal for the failure to timely seek a default, a court has the power to dismiss an action *sua sponte* (*Perricone v City of New York*, 62 NY2d 661, 663 [1984]; *Winkelman v H&S Beer and Soda Discounts, Inc.*, 91 AD2d 660, 661 [2d Dept 1982]).

Discussion

Here, TLOA submits an affidavit which evinces that on October 28, 2021, defendant New York State Department of Taxation and Finance (NYCDF) was served with the summons and complaint when a copy of same was delivered to Candice Sowards, an agent authorized to accept service of process on behalf of NYCDF, at Building #9, W.A. Harriman Campus, Albany, New York 12227. Moreover, the complaint alleges that NYCDF may have an interest in the Property by virtue of possible liens due and owing from Unique. Copies of liens are attached to the complaint.

TLOA submits an affidavit which evinces that on November 4, 2021, defendant New York City Environmental Control Board (NYECB) was served with a copy of the summons and complaint when a copy of same was delivered to Arifton Marke, an agent authorized to accept service of process on behalf of NYECB, at 100 Church Street, 1st Floor, New York, New York

10007. Moreover, the complaint alleges that NYECB may have an interest in the Property by virtue of possible franchise taxes due and owing against Unique.

Based on the foregoing, TLOA establishes that the foregoing defendants were duly served with the summons and complaint. Also, the complaint verified by Plaintiff Michael Weinreb, establishes that the claims against them have merit. Significantly, as discussed previously, the objective of a foreclosure action is “to extinguish the rights of redemption of all those who have a subordinate interest in the property and to vest complete title in the purchaser at judicial sale” (*6820 Ridge Realty LLC* at 26; *Polish Nat. All. of Brooklyn, U.S.A.* at 404). As such, to the extent that the complaint alleges that these defendants may have an interest in the Property, the claims against them have merit.

MOTION FOR AN ORDER OF REFERENCE

TLOA’s motion seeking an order of reference is granted. Significantly, having granted TLOA summary judgment as against Unique and Hasan and a default judgment against all other defendants, an order of reference is warranted.

MOTION TO SUBSTITUTE TLOA AS NAMED PLAINTIFF

TLOA’s motion seeking substitution of TLOA as named plaintiff in this action is granted. As previously noted, CPLR § 1018 provides that “[u]pon any transfer of interest the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action. Further, an assignee may, if it chooses, take the steps necessary to effect a formal substitution (*Brighton BK, LLC* at 1001).

Here, TLOA demonstrated that Plaintiffs’ interests in the note and mortgage were duly transferred to TLOA by assignment of mortgage and by allonge attached to the note on February 4, 2022. Since all of the Plaintiffs’ interests have been transferred to TLOA, it may be substituted as the named plaintiff herein.

MOTION TO DELETE DEFENDANTS NAMED JOHN/JANE DOE

TLOA's motion for an Order, pursuant to CPLR § 1024, deleting the names of "John Does" and "Jane Does" is treated as one to discontinue the action against the foregoing parties and is granted. Notably, TLOA's papers are bereft of any discussion undergirding the relief sought. Indeed, the relief sought by TLOA is not available to it pursuant to CPLR § 1024, which authorizes the substitution on of parties whose identities are initially unknown (*id.* ["A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly."]; (*Deutsche Bank Nat. Trust Co. v Islar*, 122 AD3d 566, 568 [2d Dept 2014]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 1046 [2d Dept 2012])). Here, where the relief sought is the deletion and/or omission of parties from the instant action, the proper course is to seek discontinuance against those parties. This is especially true here, where it appears that the foregoing defendants were never served, and therefore, never answered, such that the action could have been voluntarily discontinued without leave of court (CPLR § 3217[a] ["Any party asserting a claim may discontinue it without an order . . . by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court."])). Since TLOA failed to do foregoing, this Court shall order the instant action be discontinued against the foregoing defendants (CPLR § 3217[b] ["Except as provided in subdivision (a), an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper."])).

Accordingly, it is hereby


ORDERED that the caption be amended to state TLOA Mortgage, Inc. as the sole Plaintiff and to reflect the discontinuance of this action against all "John Does" and "Jane Does.". It is further

ORDERED that judgment be entered against all defendants to the extent indicated in the Order of Reference annexed hereto. It is further

ORDERED that TLOA shall serve a copy of this Decision and Order and Order of Reference annexed hereto with Notice of Entry upon defendants within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: Bronx, New York
June 15, 2023

Hon. 
FIDEL E. GOMEZ, J.S.C.

At an IAS Term, Part 32 of the Supreme Court of the State of New York, County of Bronx held at the Courthouse thereof, 851 Grand Concourse, Bronx, New York 10451, on the 15th day of June, 2023

PRESENT: HON. **FIDEL E. GOMEZ**
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

LAWRENCE M. WILENS, AS TO A 23.33% PARTICIPATION INTEREST, MICHAEL SUSSMAN AS TO A 23.33% PARTICIPATION INTEREST, KENNETH L. KAPLAN AS TO A 13.33% PARTICIPATION INTEREST, SALVATORE VICARI AS TO A 16.67% PARTICIPATION INTEREST, MICHAEL WEIN RED AS TO A 3.34% PARTICIPATION INTEREST, AJK NY SRVICING AS TO A 13.33% PARTICIPATION INTEREST, LESLIE GRANOFF, AS TO A 6.67% PARTICIPATION INTEREST,

Plaintiff,

-against-

UNIQUE OPPORTUNITY USA, INC.; S.M. ABUL HASAN; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; "JOHN DOES" and "JANE DOES" and "XYZ CORPORATION 1-10" said names being fictitious; parties intended being possible tenants or occupants of premises, and corporations, other entities or person who claim or may claim, a lien against the premises,

Defendants.

Index No. 814396/2021E

(Mot. Seq. # 002)

ORDER

COMMERCIAL
PROPERTY ADDRESS:

2932 Holland Avenue
Bronx, New York 10467

Block: 4548 Lot: 18

Upon reading the Summons and Complaint, exhibits attached thereto, the Notice of Pendency, the Affidavit of Linda Salamon, sworn to on the 21st day of April 2023, the Affirmation for the entry of a default judgment, and discontinuance of Regularity of Michael E. Camporeale, Esq., the notice of motion for summary judgment filed by the successor in interest to the named plaintiff, TLOA Mortgage, LLC ("TLOA"), dated April

21, 2023, and all documents attached and submitted in support thereto, including the memorandum of law dated April 21, 2023;

NOW, on motion of The Camporeale Law Group PLLC, attorneys for TLOA, it is hereby **ORDERED** that the motion for summary judgment is hereby granted; and it is further

ORDERED that Edmond Pryor, Esq., with an address of 292 City Island Ave
Bronx, NY 10464
718-829-0222 is hereby appointed

Referee to ascertain and compute the amount due except for attorneys' fees upon the bond/note and mortgage being foreclosed in this action, and to determine whether the mortgaged premises can be sold in parcels and the Referee to report to the court with all convenient speed; and it is further

ORDERED that, if required, said Referee take testimony pursuant to RPAPL §1321, and it is further

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

ORDERED that pursuant to CPLR §8003(a), in the discretion of the court, a fee of \$ 350, shall be paid to the Referee for the computation stage and upon the filing of his/her report; and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for him/herself or paying funds to him/herself without compliance with part 36 of the Rules of the Chief Administrative Judge, and it is further

FG
JS

ORDERED that a copy of this Order with Notice of Entry shall be served upon the designated Referee, the owner of the equity of redemption, any Tenants named in this action and any other party entitled to notice within 30 days of entry and no less than 30 days prior to any hearing before the Referee. The Referee shall not proceed to take evidence as provided herein without proof of such service, which proof must accompany any application for Final Judgment of Foreclosure and Sale.

ORDERED that the caption in this case is amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

TLOA MORTGAGE, LLC,

Plaintiff,

-against-

UNIQUE OPPORTUNITY USA, INC.; SM ABUL
HASAN; NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,

Defendants.

Index No. 814396/2021E

Pursuant to CPLR §8003 (a) and in the discretion of the court, a fee of \$250.00 shall be paid to the Referee upon the filing of the report, and in accordance with CPLR §8003 (b), the statutory fee shall be paid to the Referee at the time of foreclosure same.

ENTER

JSC.

FIDEL E. GOMEZ