

NY 2015 Boat LLC v 2435 Kingsland LLC
2023 NY Slip Op 35275(U)
November 3, 2023
Supreme Court, Bronx County
Docket Number: Index No. 806264/2022E
Judge: Fidel E. Gomez
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

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

-----X
NY 2015 BOAT LLC,

Plaintiff,

Index No. **806264/2022E**

Hon. **FIDEL E. GOMEZ**
Justice

- against -

2435 KINGSLAND LLC, ERIC SHAPIRO, STEVEN J. SHAPIRO, CITY OF NEW YORK DEPARTMENT OF FINANCE, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD AND "JOHN DOE NO. 1 THOUGH JOHN DOE NO.99," SAID NAMES EING FICTITIOUS, PARTIES INTENDED BEING POSSIBLE TENANTS OR OCCUPANTS OF PREMISES, AND CORPORATIONS, OTHER ENTITIES OR PERSONS WHO CLAIM, OR MAY CLAIM, A LIEN AGAISNT THE PREMISES,

Defendants.

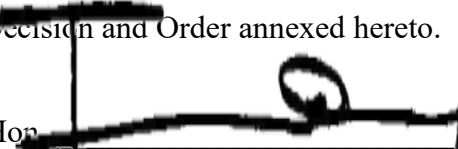
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The following papers numbered 1 to 2, Read on this Motion noticed of 9/22/23, and duly submitted as no. 4 on the Motion Calendar of 9/22/23.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause – Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers- Proposed Order of Reference	2	
Memorandum of Law		

Plaintiff's motion is decided in accordance with the ~~Decision~~ and Order annexed hereto.

Dated:

11/3/23

Hon. 

FIDEL E. GOMEZ, JSC

1. CHECK ONE

2. MOTION/CROSS-MOTION IS

3. CHECK IF APPROPRIATE.

☐ CASE DISPOSED

☒ GRANTED (MOTION)

☐ GRANTED IN PART

☐ SETTLE ORDER

☐ SUBMIT ORDER

☐ DO NOT POST

☒ NON-FINAL DISPOSITION

☐ DENIED (MOTION)

☐ OTHER

☐ FIDUCIARY APPOINTMENT

☐ REFEREE APPOINTMENT

☐ NEXT APPEARANCE DATE:

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

-----X
NY 2015 BOAT LLC,

Plaintiff,

-against-

DECISION AND ORDER

Index No. 806264/2022E

**2435 KINGSLAND LLC, ERIC SHAPIRO, STEVEN
J. SHAPIRO, CITY OF NEW YORK
DEPARTMENT OF FINANCE, CITY OF NEW
YORK ENVIRONMENTAL CONTROL BOARD
AND “JOHN DOE NO. 1 THROUGH JOHN DOE
NO. 99,” SAID NAMES BEING FICTITIOUS,
PARTIES INTENDED BEING POSSIBLE TENANTS
OR OCCUPANTS OF PREMISES, AND
CORPORATIONS, OTHER ENTITIES OR
PERSONS WHO CLAIM, OR MAY CLAIM, A
LIEN AGAINST THE PREMISES,**

Defendants.

-----X

Plaintiff’s motion for, *inter alia*, summary judgment, pursuant to CPLR § 3212, is granted.

BACKGROUND

This is an action to foreclose a commercial mortgage which encumbers real property located at 2435 Kingsland Avenue, Bronx, New York 10469. The complaint alleges, *inter alia*, as follows: On February 11, 2021, defendant 2435 Kingsland LLC (Kingsland) executed and delivered a promissory note to plaintiff whereby it promised to pay the principal sum of \$300,000 plus interest. On that same date, defendants Eric Shapiro (Eric) and Steven J. Shapiro (Steven) executed a guaranty to plaintiff guaranteeing Kingsland’s repayment of the note. As collateral security for repayment of the note, Kingsland executed and delivered a mortgage in the principal sum of \$300,000. Plaintiff is the holder of the note and was in possession of the note and mortgage at the time this action was commenced. Pursuant to the note, Kingsland promised

to make consecutive monthly payments of principal and/or interest on the first day of each month commencing on April 1, 2021 and on the first day of each succeeding month to and including November 11, 2022, at which time the remaining principal amount and accrued interest became due and payable. Kingsland defaulted on its obligations under the terms of the note by failing and omitting to pay plaintiff the amounts due on April 1, 2021 and each and every month thereafter. By the filing of the complaint, plaintiff has elected to declare the entire unpaid principal balance, unpaid interest and other amounts due and payable.

MOTION FOR SUMMARY JUDGMENT

Plaintiff'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 plaintiff under the note and mortgage. Significantly, plaintiff establishes that it currently holds the note and mortgage, both executed by Kingsland, and that Kingsland defaulted under the terms of the note and mortgage. Further, plaintiff establishes the existence of the guaranty signed by Eric and Steven, the underlying debt and their failure to perform under the guaranty.

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]; *Coöperatieve 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" (*Coöperatieve 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

Plaintiff's motion for, *inter alia*, summary judgment on its foreclosure claim against Defendants 2435 Kingsland LLC, Eric Shapiro and Steven J. Shapiro is granted.

In support of the motion, plaintiff submitted the affidavit of its manager, Andrea Butler (Butler) wherein she reiterated the allegations in the complaint and, in addition, states as follows: She is the Manager of plaintiff and has full knowledge of the facts of this matter. Plaintiff owns and services its own mortgage loans and is possession of and maintains the books and records with respect to the instant loan. With respect to this loan, plaintiff has collected and posted payments, if any, handled all aspects of customer service, and referred this loan for foreclosure when the borrower, Kingsland, defaulted on its monthly loan payments. In the regular

performance of her duties as Manager, she is familiar with the business records maintained by plaintiff for the purpose of servicing mortgage loans. These records are made at or near the time of the activity or transactions by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records, and are kept in the course of business conducted regularly by plaintiff. It is the regular practice of plaintiff's mortgage servicing business to make, incorporate and/or maintain these records. Butler has knowledge of the underlying facts herein, having negotiated the underlying loan and personally processed the received loan payments. She has personally reviewed every document attached to her affidavit.

Kingsland default on its obligations under the terms of the note by failing to pay to the owner and holder of the note the payments due on March 1, 2022 and each and every month thereafter. The current balance due plaintiff is \$365,884.84. Other than the pre-paid payments received pursuant to the Interest Reserve Agreement, no payments have been made on the loan.

Butler states that she has personally reviewed the documents attached to her affidavit, which include the note in the principal amount of \$300,000 (signed by Eric on behalf of the LLC), guaranty (signed by Eric and Steven), mortgage between plaintiff and Kingsland (signed by Eric on behalf of the LLC), and Interest Reserve Agreement (signed by Eric on behalf of the LLC).

Here, Butler's affidavit and attached exhibits sufficiently establish plaintiff's *prima facie* entitlement to judgment as a matter of law, and, thereby, shift the burden to defendants to produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

In opposition to the motion, Eric and Steven (together "defendants") contend that the motion should be denied on two grounds: (1) there are triable issues of fact as to whether the mortgage at issue was fraudulently induced, thereby rendering the loan voidable, and whether the loan itself is either civilly or criminally usurious and (2) the motion is premature as no discovery has taken place and pertinent evidence relating to defendants' affirmative defenses is solely within plaintiff's custody and control.

In support of their contentions, defendants submitted the affidavits of Eric and Steven, respectively. In his affidavit, Eric states as follows: Plaintiff seeks to enforce a hard-money loan, with abusive terms, “disguised” as a commercial loan when the property pledged as security for the loan is a residential property – a house occupied by Steven, the co-borrower. As such, Eric asserts, this action should be heard in the residential foreclosure part and not the commercial division. The property at issue has been in his family for more than 50 years, and both and he and Steven grew up in the house. After their father died, Eric and Steven transferred the deed to the property to themselves as co-owners. In early 2020, Eric and Steven began approaching banks for a mortgage loan to make overdue repairs to the house and to pay off certain debts and judgments. Of particular concern to them were arrears for property taxes, in connection with they were afraid that the NYC Dept. of Finance would file a lien against the property. Both Eric and Steven are tradesmen with limited income and bad credit, and were told by banks that they would not qualify for a loan. In Spring 2020, Eric found an advertisement on the internet by a broker named Larry Jonathan (Jonathan). Eric contacted Jonathan who assured Eric that he worked with lenders who could provide Eric and Steven with a loan. Jonathan told Eric that he had experience in helping individuals with poor credit get mortgage loans, but that the loan would have a higher interest rate than a regular mortgage loan. Eric understood that the mortgage loan would be about \$300,000 with a term of eighteen months, during which time no payments would be due. This would give Eric and Steven some breathing room to pay off debts, get rid of judgments and improve their credit so that they could qualify for a “regular mortgage loan to pay off the loan.” On or about January 31, 2021, Jonathan sent Eric over 18 documents to review, including the note, mortgage, pledge and security agreement, guaranty, and certificate of commercial loan with a waiver of federal and state regulations of lending. Not being a lawyer, Eric was overwhelmed by these documents and did not understand the legal terms. Also, since he had never taken out a mortgage, Eric did not understand why so many documents were created for a small loan. Eric noted that the documents referred to Kingsland as the borrower and himself and Steven as members of the LLC. Until he received those documents, he had no idea that an LLC had been created. He first received a copy of the LLC papers from Jonathan at

the closing, at which time he realized that the LLC was set up with the Dept. of State in May 2020, without his knowledge or consent. Eric was concerned that the loan was set up as a commercial loan and, when he questioned Jonathan about this, he was told that the lender would only make commercial loans even though Eric and Steven were “just homeowners.” Eric now understands that this was done to get around federal and state laws that govern lending. Eric first met Jonathan in person at the closing on February 11, 2021. Steven was unable to attend the closing because he had Covid-19. Eric met an attorney named Martin Braunschweig (Braunschweig) at the closing and was told that he would represent Eric and Steven. Eric had never met Braunschweig before and he did not have the opportunity to review, and ask questions about, the documents with him. Braunschweig “had [Eric] sign over a dozen documents with virtually no explanation as to what [he] was signing.” The only issue Eric understood from Braunschweig was that the term of the loan was eighteen months, that it was a high interest rate, and that no payments would be due. One of the documents Eric was asked to sign was an “Interest Reserve Account,” which allowed the lender to retain \$36,000 to cover the monthly interest of \$3,000 over a twelve-month period. This was another reason why Eric believed that no payments would be due, at least for twelve months. An attorney from the title company attended the closing, and the title company retained some of the funds to pay off the outstanding judgments and debts. At the end of the closing, Eric was presented with a breakdown of the distribution of the funds. After the payment of debts, and fees associated with the loan transaction, Eric and Steven were to receive \$103,692.69, payable to Kingsland. Although Eric was a bit shocked by all the fees, he expected to walk away from the closing with a check in the amount of \$103,692.69 in hand but he received no check at the closing. About a week later, having not received a check in the mail, Eric inquired with Braunschweig about the check. Thereafter, Braunschweig contacted the lender’s attorney who provided Braunschweig with a wire transaction receipt which indicated that the funds had been wired to Navy Federal Credit Union (Navy Credit), located in Virginia. Braunschweig determined that the account to which the funds were wired was set up by Jonathan, who had used his own social security number to open the account. Based upon information received after an investigation, Eric and Steven

believe that the name Larry Jonathan is an alias. Eric called Navy Credit to withdraw the funds but was informed that the account had been “flagged for potential fraud and was frozen.” About one month after the closing, Eric and Steven drove to a branch of Navy Credit, located near West Point, NY. Although Eric presented the LLC papers to a bank representative along with personal identification documents, the bank was “unwilling or unable” to release the funds to him, “apparently because [of] the way the account was set up by the broker Jonathan.” Despite many attempts, Eric and Steven have never been able to access the funds. After payment of the judgments and debts, Eric and Steven received only \$75,000 of the loan proceeds. Eric and Steven are unfamiliar with the lender NY 2015 Boat LLC and believe that they have been defrauded. Despite this fraud, the lender is now seeking to take their home and remaining equity by bringing this foreclosure action. Attorneys have explained to Eric that, to get to the bottom of what happened, they need to conduct discovery because there are many factual issues. Eric attached copies of the deed to the property, the documents Braunschweig sent to him, LLC documents, a deed transfer, a wire transaction receipt, and several emails between Jonathan and/or the lender’s attorney and Braunschweig to his affidavit.

In his affidavit, Steven reiterates much of what Eric stated in his affidavit. In addition, Steven states as follows: Steven grew up in the subject house and never moved out. He found out about the foreclosure by accident when he went to the bank to see if he could refinance the loan. At that time, Steven was informed by a bank representative that his home was in foreclosure. Although Steven lives at the property, he discovered the foreclosure complaint was never served at the property because the process server erroneously claimed that the house was vacant. The house next door is vacant so it is possible that the process server confused the two homes. Up to the time of the closing, Eric mostly dealt with the broker. Steven had Covid-19 at the time of the scheduled closing and the lender refused to adjourn the closing. A few days before the closing, he received “a few documents to sign.” Steven signed the documents, although not before a notary public, and sent them back to Braunschweig. Steven was surprised to learn from Eric that an LLC was set up in May 2020. Neither of them knew about the LLC or signed any papers to set up the LLC. It is Steven’s understanding that Navy Credit did not

release the funds to Eric because the account had been set up by Jonathan. It is now clear to Eric and Steven that they were defrauded.

As noted above, defendants assert that triable issues of fact exist as to whether the mortgage at issue was fraudulently induced, thereby rendering the loan voidable, and whether the loan itself is either civilly or criminally usurious and (2) the motion is premature as no discovery has taken place and pertinent evidence relating to defendants' affirmative defenses is solely within plaintiff's custody and control. These arguments fail for the following reasons.

With respect to (1) above, significantly, defendants failed to plead either fraud or usury as an affirmative defense in their answer.¹ Notably, CPLR § 3018(b) provides that

[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as arbitration and award, collateral estoppel, culpable conduct claimed in the diminution of damages as set forth in article fourteen A, discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of the party defending, payment, release, res judicata, statute of frauds, or statute of limitations. The application of this subdivision shall not be confined to the instances enumerated.

¹As Plaintiff notes, to the extent that the fortieth affirmative defense can be construed as a fraudulent inducement defense, it is inadequately plead. In this regard, defendants allege merely that "Plaintiff and/or its predecessor engaged in conduct to transfer the property from the individual defendants to an LLC without the knowledge of the individual defendants. It is unknown who the members of the LLC are." This is insufficient to satisfy the pleading requirements for fraud claims as set forth in CPLR § 3016(b), which requires that "the circumstances constituting the wrong shall be stated in detail." Significantly, "a plaintiff seeking to recover for fraud and misrepresentation is required to set forth specific and detailed factual allegations that the defendant personally participated in or had knowledge of any alleged fraud" (*Friedman v. Anderson*, 23 AD3d 163, 166 [1st Dept 2005]). Here, there are no specific allegations that plaintiff had any involvement in either the creation of the LLC or the transfer of the real property to the LLC. Indeed, in their affidavits, Eric and Steven state that they are "unfamiliar with the lender NY 2015 Boat LLC." Moreover, the elements of a cause of action for fraud consist of "a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). Here, the answer and affidavits of Eric and Steven are bereft of any such allegations against plaintiff.

An affirmative defense, as defined by CPLR § 3015(b) is waived if not pleaded in an answer (*Butler v Catinella*, 58 AD3d 145, 150 [2d Dept 2008] [“Affirmative defenses, such as those set forth in CPLR 3018(b), as a general rule, would be deemed waived if not raised in the pleadings.”]); *Surlak v Surlak*, 95 AD2d 371, 383 [2d Dept 1983] [“The general rule is that an affirmative defense is deemed waived if not raised in the pleadings.”]).

However, when a defendant fails to plead an affirmative defense, as required by CPLR § 3211(e) and CPLR § 3018(b), but nevertheless asserts that defense in connection with a motion for summary judgment, the waiver is said to be retracted and the court can grant, when the defendant is the movant, or deny, when the defendant is the opponent, summary judgment based upon the unpleaded affirmative defense (*Lerwick v Kelsey*, 24 AD3d 918, 919-920 [3d Dept 2005]; *Allen v Matthews*, 266 AD2d 782, 784 [3d Dept 1999]; *Adsit v Quantum Chem. Corp.*, 199 AD2d 899, 900 [3d Dept 1993]). The threshold inquiry is whether in considering the unpleaded defense, the opponent of the defense is prejudiced thereby (*BMX Worldwide v Coppola*, 287 AD2d 383, 384 [1st Dept 2001]; *Allan* at 784; *Seaboard Sur. Co. v Nigro, Bros.*, 222 AD2d 574, 574 -575 [2d Dept 1995]; *Rogoff v San Juan Racing Assn. Inc.*, 77 AD2d 831, 832 [1st Dept 1980, *affd*, 54 NY2d 883 [1981]). Such prejudice, however, is ameliorated when the defense was previously raised on a prior motion or during discovery (*id.*), or when the opponent of the motion, where defendant seeks summary judgment based upon said defense, is given an opportunity to fully respond to the motion for summary judgment (*Sheils v County of Fulton*, 14 AD3d 919, 921 [3d Dept 2005], *lv denied* 4 NY3d 711[2005]; *Kirilescu v American Home Prods. Corp.*, 278 AD2d 457, 457-458 [2d Dept 2000], *lv denied* 96 NY2d 933 [2001]; *McSorley v Philip Morris, Inc.*, 170 AD2d 440, 441 [2d Dept 1991], *appeal dismissed* 77 NY2d 990 [1991]; *International Fid. Ins. Co. v Robb*, 159 AD2d 687, 689 [2d Dept 1990]).

Here, Kingsland, Eric and Steven have not retracted their waiver in failing to plead fraud and usury as affirmative defenses since those issues are raised for the first time in opposition to

the instant motion and defendants do not seek affirmative relief, but rather, merely oppose this motion for summary judgment.²

Moreover, here, where the guaranty executed by the parties states that “no set-off, counterclaim, reduction or diminution of any obligation, or any defense of any kind or nature which Guarantor has or may have against Lender, or any assignee or successor thereof, shall be available hereunder to Guarantor in respect of any matter arising out of this Guaranty, except payment in full of all obligations of Borrower under the Loan Documents,” as a matter of simple contract law, the guarantors cannot argue fraud or usury.

Indeed, “[g]uaranties that contain language obligating the guarantor to payment without recourse to any defenses or counterclaims, i.e., guaranties that are absolute and unconditional, have been consistently upheld by New York courts” (*Cooperative Centrale Raiffeisen-Boerenleenbank, B.A., v Navarro*, 25 NY3d 485, 492-493 [2015][internal quotation marks and citations omitted]; see also *Citibank v Plapinger*, 66 NY2d 90 [1985]; *Chemical Bank v Sepler*, 60 NY2d 289 [1983]; *United Orient Bank v Bao Lee*, 223 AD2d 500 [1st Dept 1996]). Here, significantly, Article 2 of the guaranty expressly states that the guarantor “irrevocably and unconditionally guarantees” full and prompt payment of the amounts due under the loan, and that the guarantor agrees that the guaranty “constitutes an absolute, unconditional, present and continuing **GUARANTEE OF PAYMENT AND PERFORMANCE**” (emphasis in original). Accordingly, here, where plaintiff had every expectation that Eric and Steven were estopped from raising fraud and usury as defenses, pursuant to the guaranty, extreme prejudice precludes their consideration.

Since plaintiff has established “the existence of the guaranty, the underlying debt and the guarantor’s failure to perform under the guaranty” an order enforcing the guaranty is warranted (*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]).

²The Court notes that no papers opposing the instant motion were submitted on behalf of Kingsland.

Further, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Here, as the clear and unambiguous language of the guaranty permits the defense of payment only, defendants cannot now raise additional defenses to foreclosure in this action. For this reason, all of defendants' affirmative defenses must be dismissed.

With respect to (2) above, defendants have failed to proffer any reason to suggest that additional discovery may lead to relevant evidence. Indeed, defendants admit to being in possession of all the closing documents. The mere hope and speculation that evidence necessary to defeat summary judgment might be uncovered during discovery is an insufficient basis upon which to deny the motion (*Sterling National Bank v Alan B. Brill, P.C.*, 186 AD3d 515, 518 [2d Dept 2020; *HSBC Bank USA, Nat. Ass'n v Armijos*, 151 AD3d 943, 944 [2d Dept 2017]).

MOTION FOR DEFAULT JUDGMENT

Plaintiff's motion seeking an order entering a default judgment against all non-appearing defendants is granted. Significantly, plaintiff 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 © 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, plaintiff submits an affidavit which evinces that on April 26, 2022, defendant City of New York Department of Finance (DOF) was served with the summons and complaint when a copy of same was delivered to Inez Contreras, an agent authorized to accept service of process on behalf of DOF, at 100 Church Street, New York, New York 10007. Moreover, the complaint alleges that DOF may have an interest in the Property by virtue of possible NYC Business Tax owing from Kingsland.

Plaintiff submits an affidavit which evinces that on April 26, 2022, defendant City of New York Environmental Control Board (ECB) was served with a copy of the summons and complaint when a copy of same was delivered to Inez Contreras, an agent authorized to accept service of process on behalf of ECB, at 100 Church Street, New York, New York 10007. Moreover, the complaint alleges that ECB may have an interest in the mortgage property due to

its status as a judgment creditor. Plaintiff attached a “DataTrace” printout which lists ECB violation #039037957Z against Kingsland in the amount of \$500.00, docketed 12/2021.

Based on the foregoing, plaintiff establishes that the foregoing defendants were duly served with the summons and complaint. Also, the affidavit and attached exhibits of Butler 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 mortgage property, the claims against them have merit.

MOTION FOR AN ORDER OF REFERENCE

Plaintiff’s motion seeking an order of reference is granted. Significantly, having granted plaintiff summary judgment as against Kingsland, Eric and Steven, and a default judgment against all other defendants, an order of reference is warranted.

MOTION TO STRIKE JOHN DOE’S FROM CAPTION AND AMEND COMPLAINT

Plaintiff’s motion seeking to strike John Doe No. 1 through John Doe No. 99 from the caption and amend the complaint accordingly is granted. Plaintiff submits an affidavit which evinces that on April 27, 2022, service of the summons and complaint was attempted to be made upon tenants of the mortgaged premises. The affidavit indicates that the process server was unable to effect service on tenants for the following reason: “ADDRESS IS VACANT. NO JOHN DOES.” As such, plaintiff has demonstrated (and defendants do not dispute) that there are no tenants at the mortgaged property.

Accordingly, it is hereby

ORDERED that the caption be amended to delete the names John Doe No. 1 through John Doe No. 99 as defendants in this action. It is further

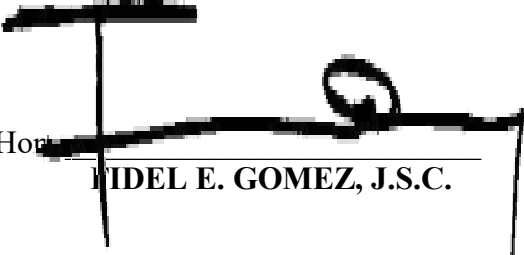
ORDERED that judgment be entered against all defendants to the extent indicated in the Order of Reference annexed hereto. It is further

ORDERED that plaintiff shall serve a copy of this Decision and Order upon all defendants, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: Bronx, New York
November 3 , 2023

Hon.


FIDEL E. GOMEZ, J.S.C.

At IAS Part 32 of the Supreme Court of the State of New York, held in and for the County of Bronx at the Courthouse, located at 851 Grand Concourse, Bronx, NY, on the 3rd day of November, 2023.

Present: Hon. FIDEL E. GOMEZ, Justice.

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

-----X
NY 2015 BOAT LLC,

Index No.: 806264/2022E

Plaintiff,

-against-

**ORDER OF
REFERENCE**

2435 KINGSLAND LLC, ERIC SHAPIRO, STEVEN J. SHAPIRO, CITY OF NEW YORK DEPARTMENT OF FINANCE, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD and "JOHN DOE No. 1 through JOHN DOE No. 99", said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Foreclosure of:
2435 Kingsland Avenue
Bronx, NY 10469

Block 4484
Lot 41

Commercial Mortgage

Defendants.

-----X
UPON review of the Notice of Motion dated September 1, 2023, the Summons, Complaint and Notice of Pendency filed in this action on April 22, 2022, respectively, and upon the Affirmation of Michal Falkowski, Esq., of Richland & Falkowski, PLLC, counsel for Plaintiff, dated September 1, 2023, from which it appears that this action was brought to foreclose a certain commercial mortgage on real property situated in the County of Bronx, State of New York, at 2435 Kingsland Avenue, Bronx, NY 10469 (Block 4484 Lot 41) by reason of certain defaults as alleged in the Complaint, and upon the Affidavit of Merit and Amount Due of Andrea Burkner, Manager of NY 2015 Boat LLC, plaintiff herein, sworn to on December 13, 2022, and it further appearing that all of the defendants have been duly served with a copy of the Summons and Complaint, as applicable, or have appeared herein, copies of such affidavits of service being annexed to the motion as Exhibit "7" [except the Defendants "JOHN DOE No. 1

through JOHN DOE No. 99" who were not served copies of the Summons and Complaint and are not necessary parties to this action,], and, other than defendants 2435 KINGSLAND LLC, ERIC SHAPIRO and STEVEN J. SHAPIRO, no answer has been interposed by the defendants though the time so to do has expired; and it appearing that none of the defendant[s] is an infant, incompetent or absentee, or in the military, and that since the filing of the Notice of Pendency of this action on April 22, 2022, the complaint has not been amended in any manner whatsoever; on the pleadings and papers heretofore filed herein and no one appearing in opposition hereto,

NOW, on the motion of Richland & Falkowski, PLLC, attorneys of record for the Plaintiff, it is

ORDERED, that the motion is granted; and it is further

ORDERED, that this action be, and the same is hereby referred to SERGIO MARQUEZ
835 WALTON AVE STE 4
LAW OFFICE OF SERGIO MARQUEZ, having an office at BRONX, NY 10451

_____, telephone number 718-293-1000, as Referee to ascertain and compute the amount due to the Plaintiff herein for principal, interest, and other disbursements advanced as provided for by statute and in the Note and Mortgage upon which this action was brought, to examine and report whether or not the mortgaged premises should be sold in parcels, and that the Referee make his/her report with all convenient speed and that, except for good cause shown, the Plaintiff shall move for judgment no later than 6 months of this order; and it is further

ORDERED, that no hearing will be held for this advisory report, and it is further

ORDERED, that upon submission of the Referee's Report, Plaintiff shall pay \$350.00 to the Referee as compensation for his/her services, which sum may be recouped as a cost of litigation.

ORDERED that the Referee appointed herein is subject to the requirements of Rule 36.2(c) of the Chief Judge, and if the Referee is disqualified from receiving an appointment

pursuant to the provision of that Rule, the Referee shall notify the Appointing Judge forthwith; 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 NYCCR Part 36), including but not limited to, Section 36.2(e) ("Disqualifications from appointment"), and Section 36.2(d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED, that summary judgment is granted in favor of the Plaintiff and against defendants 2435 KINGSLAND LLC, ERIC SHAPIRO and STEVEN J. SHAPIRO as to the claim(s) described in the Plaintiff's Complaint herein; and it is further

ORDERED, that defendants 2435 KINGSLAND LLC, ERIC SHAPIRO, STEVEN J. SHAPIRO's answer is hereby stricken; and it is further

ORDERED, that the caption of this action be amended by striking therefrom the remaining defendants sued herein as "JOHN DOE No. 1" through "JOHN DOE No. 99", all without prejudice on the proceedings heretofore had herein; and it is further

ORDERED that the caption of the action be amended to read as follows:

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

-----X
NY 2015 BOAT LLC,

Index No.: 806264/2022E

Plaintiff,

-against-

2435 KINGSLAND LLC, ERIC SHAPIRO, STEVEN J. SHAPIRO, CITY OF NEW YORK DEPARTMENT OF FINANCE and CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD,

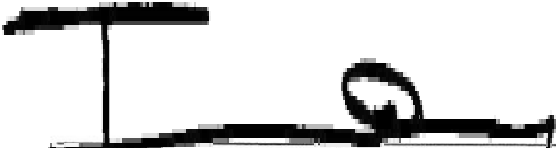
Defendants.

-----X

and it is further

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 twenty (20) days of entry. 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.

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 his report, and in accordance with CPLR §8003 (b), the statutory fee shall be paid to the Referee at the time of the foreclosure sale.


FIDEL E. GOMEZ
Justice, Supreme Court, Bronx County