SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 850134/2024

QPTF LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

224 SAPPHIRE LLC,BSD 777-57 LLC,BSD 65 LLC,224 SHUR LLC,224 W 57 LEASEHOLD LLC,ABRAHAM TALASSAZAN, THE CITY OF NEW YORK, THE NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, THE NEW YORK CITY DEPARTMENT OF FINANCE, THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, BOARD OF MANAGERS OF THE 224 WEST 57 LEASEHOLD CONDOMINIUM, JOHN DOE NO. 1 TO JOHN DOE NO. 20

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119

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

Upon the foregoing documents, the motion and cross-motion are determined as follows:

This is an action to foreclose on a consolidated, amended and restated mortgage encumbering commercial real property located at 224 West 57th Street, New York, New York (Block 1028, Lot 47 n/k/a Lots 1101, 1103, 1104 and 1106), given by Defendants 224 Shur LLC, 224 Sapphire LLC, BSD 777-57 LLC, BSD 65 LLC, and 224 W 57 Leasehold LLC ("Mortgagors") to non-party Aareal Capital Corporation ("Aareal"). The mortgage secures a consolidated, amended and restated promissory note which evidences a loan with an original principal amount of $145,000,000.00. The note and mortgage, as well as a loan agreement, all dated June 27, 2018, were executed by Defendant Abraham Talassazan ("Talassazan") as Managing Member of all Mortgagors. The loan agreement provides concerning payments that "All payments and other amounts due under the Note, this Agreement and the other Loan Documents shall be made without any setoff, defense or irrespective of, and without deduction for, counterclaims". Likewise, on enforceability it states that: "The Loan Documents are not subject to any right of rescission, set-off, counterclaim or defense by Borrower, including the defense of usury, and Borrower has not asserted any right of rescission, set-off, counterclaim or defense with respect thereto." Concomitantly with these documents, Talassazan also executed separate payment, and recourse guarantees of the indebtedness.

By agreement dated January 7, 2019, the parties assented to split the original note into three notes of the same date in the amounts of 30,000,000.00, 30,000,000.00 and $85,000,000.00, and

identified as notes A-1, A-2 and B, respectively. Further, Mortgagors and Talassazan acknowledged the indebtedness in the splitter agreement and ratified and confirmed the contents of the loan documents. On June 23, 2023, the parties executed a second amendment to and reaffirmation of loan documents wherein, among many other things, Mortgagors and Talassazan admitted the indebtedness and their obligation to repay same. This pact also contained a waiver of claims and defenses against Aareal, limited to events that "accrued prior to the date hereof". Little more than three months later, the parties executed a third amendment to and reaffirmation of loan documents which was virtually identical to the preceding reaffirmation.

Plaintiff commenced this action wherein it is alleged Defendants defaulted in repayment under the loan when it matured on October 27, 2023, and it has pled causes of action for foreclosure and breach of the guarantees. Defendants Mortgagors and Talassazan answered jointly and pled fifteen affirmative defenses including lack of standing. Now, Plaintiff moves for *inter alia* summary judgment against the appearing Defendants, for a default judgment against the non-appearing parties, appointing a referee to compute and to amend the caption. Defendants oppose the motion and cross-move to dismiss the complaint pursuant to LLCL §808. Plaintiff opposes the cross-motion.

In moving for summary judgment, Plaintiff was required to establish *prima facie* entitlement to judgment as a matter of law though proof of the mortgage, the note, and evidence of Defendants' default in repayment (*see U.S. Bank, N.A. v James,* 180 AD3d 594 [1st Dept 2020]; *Bank of NY v Knowles*, 151 AD3d 596 [1st Dept 2017]; *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). Also, based on the affirmative defenses pled, Plaintiff was required to demonstrate its standing (*see eg Wells Fargo Bank, N.A. v Tricario*, 180 AD3d 848 [2nd Dept 2020]). Proof supporting a *prima facie* case on a motion for summary judgment must be in admissible form (*see* CPLR §3212[b]; *Tri-State Loan Acquisitions III, LLC v Litkowski*, 172 AD3d 780 [1st Dept 2019]). A plaintiff may rely on evidence from persons with personal knowledge of the facts, documents in admissible form and/or persons with knowledge derived from produced admissible records (*see eg U.S. Bank N.A. v Moulton*, 179 AD3d 734, 738 [2d Dept 2020]). No specific business records must be proffered, provided the admissibility requirements of CPLR 4518[a] are fulfilled and the records evince the facts for which they are relied upon (*see eg Citigroup v Kopelowitz*, 147 AD3d 1014, 1015 [2d Dept 2017]).

Plaintiff's motion was supported by an affidavit from Neal Paul Donnelly ("Donnelly"), an attorney-in-fact for Plaintiff. Kelly avers that his affidavit is based review of Plaintiff's records. Donnelly's affidavit laid a proper foundation for the admission Plaintiff's records into evidence under CPLR §4518 by sufficiently showing that the records "reflect[ed] a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business", "that the record[s][were] made pursuant to established procedures for the routine, habitual, systematic making of such a record" and "that the record[s] [were] made at or about the time of the event being recorded" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 204 [2d Dept 2019]; *see also Bank of Am v Brannon*, 156 AD3d 1 [1st Dept 2017]). The records of other entities were also admissible since Donnelly established that those records were received from the makers and incorporated into the records Plaintiff kept and that it routinely relied upon such documents in its business (*see eg U.S. Bank N.A. v Kropp-Somoza,* 191 AD3d 918 [2d Dept 2021]). Further, the records referenced by Donnelly were annexed to the moving papers (*cf. Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569 [1st Dept 2020]).

Donnelly's review of the attached records demonstrated the material facts underlying the claim for foreclosure, to wit the mortgage, note, evidence of mortgagor's default in repayment under the note and Plaintiff's standing (*see eg ING Real Estate Fin. (USA) LLC v Park Ave. Hotel Acquisition, LLC*, 89 AD3d 506 [1st Dept 2011]; *see also Bank of NY v Knowles*, supra; *Fortress Credit Corp. v Hudson Yards, LLC*, supra). The indebtedness was also established based upon the terms of the splitter and reaffirmation agreements (*see Redrock Kings, LLC v Kings Hotel, Inc.*, 109 AD3d 602 [2d Dept 2013]; *EMC Mortg. Corp. v Stewart*, 2 AD3d 772 [2d Dept 2003]). Accordingly, Plaintiff established its entitlement to summary judgment on its cause of action for foreclosure against Defendants.

In opposition, Defendants posit that sufficient facts exist concerning unclean hands, unconscionable conduct and/or bad faith by Plaintiff which purportedly stymied their attempts to refinance the indebtedness. "A mortgagor may be relieved from his default under a mortgage upon a showing of waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct by the mortgagee" (*see Ebc Amro Asset Mgmt. v Kaiser*, 256 AD2d 161 [1st Dept 1998]). The doctrine of unclean hands "is used only to bar the grant of equitable relief to a party who is 'guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct'" (*Wells Fargo Bank v Hodge*, 92 AD3d 775 [2d Dept 2012]). However, "conclusory, self-serving, facially unpersuasive evidence" which is not supported by documentary proof is insufficient to defeat summary judgment where evidence of Defendants' acceptance of the disputed funds and failure to make repayment is proffered (*see Connecticut Nat'l Bank v Hack*, 186 AD2d 387, 388 [1st Dept 1992]; *see also Silver v Silver*, 17 AD3d 281 [1st Dept 2005]).

Here, Defendants' assertion that Plaintiff convinced the majority tenant at the premises, Open Society Institute ("OSI"), to refuse to consummate a proposed surrender of the premises is nothing more than speculation. In support of this claim, Defendants submit a letter to Talassazan from OSI's agent, dated April 20, 2023, that states it is "an outline for a Termination Agreement". Absent is a copy of the final agreement, any corroboration to support that six-months of negotiations occurred, that Defendants accepted the offer and that it was OSI that backed out of the deal. Even if the consent to communication language in the pre-negotiation agreement between Plaintiff and Defendant is accepted as an indication that Plaintiff had been in contact with OSI six months prior to any supposedly admitted communication, Defendants failed to proffer a cogent reason that OSI's refusal to surrender its lease resulted in Defendants' maturity default on the loan.

Defendants also argue that Plaintiff interfered with their negotiations with Aareal to refinance the loans. The supposition that Aareal was not negotiating in good faith in May, June and July of 2023 is not conduct chargeable to Plaintiff as it did not take assignment of notes A-2 and B until November 23, 2023, and note A-2 until April 17, 2024. Defendants' assertions with respect to its negotiations with Plaintiff, in addition to being entirely conclusory, does not constitute conduct to support their defenses (*see Wells Fargo Bank, N.A. v Dara*, 180 AD3d 844 [2d Dept 2020]). Plaintiff's decision to not offer a loan modification or its decision to proceed to foreclosure is not immoral or unconscionable conduct (*see Bank of Smithtown v 264 W. 124 LLC*, 105 AD3d 468 [1st Dept 2013]).

As to the branch of the motion to dismiss Defendants' affirmative defenses, CPLR §3211[b] provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit". For example, affirmative defenses that are without factual foundation, conclusory or duplicative cannot stand (*see Countrywide Home Loans Servicing, L.P. v Vorobyov,* 188 AD3d 803, 805 [2d Dept 2020]; *Emigrant Bank v Myers*, 147 AD3d 1027, 1028 [2d Dept

2017]). When evaluating such a motion, a "defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Federici v Metropolis Night Club, Inc.*, 48 AD3d 741, 743 [2d Dept 2008]).

By operation of the express terms of section 4.1.17 of the loan agreement, Defendants waived their right to assert any affirmative defenses to this action (*see Weiss v Phillips*, 157 AD3d 1 [1st Dept 2017]; *Parasram v DeCambre*, 247 AD2d 283 [1st Dept 1998]; *Chemical Bank New York Trust Co. v Batter*, 31 AD2d 802 [1st Dept 1969]; *see also U.S. Bank N.A. v Kahn Prop. Owner, LLC*, 206 AD3d 855, 858 [2d Dept 2022]; *Bernstein v Dubrovsky*, 169 AD3d 410 [1st Dept 2019]). Defendants posit that that since the operative provision falls under a section titled "Enforceability", the waiver at issue only relates to the validity of the agreement. Reference to other sections of the agreement (eg. 8.1[b], 8.2 and 9.4) contradicts this assertion. For instance, section 8.1[b] states, in part, that: "[u]pon the occurrence of an Event of Default . . . Agent may take such action . . . that Agent deems advisable to protect *and enforce* its rights against Borrower and in and to the Property, including, without limitation, declaring the Debt to be immediately due and payable" (emphasis added). Section 8.2 states that the exercise of the rights and remedies upon default is not dependent upon "whether or not Agent shall have commenced any *foreclosure proceeding or other action for the enforcement of its rights and remedies* under any of the Loan Documents" (emphasis added). Indeed, that "enforcement" of loan documents refers to a foreclosure or other action is common parlance (*see eg* 1 Bergman on New York Mortgage Foreclosures §1.04[1] [2025]["a mortgage may be *enforced* only by the person empowered to enforce the note"][emphasis added]; *see also NML Capital v Republic of Argentina,* 17 NY3d 250, 259-260 [2011]["It is the role of the courts to enforce the agreement made by the parties"]).

Defendants' assertion the motion must be denied because no discovery has been conducted is unavailing as they have offered nothing to demonstrate Plaintiff is in exclusive possession of facts which would establish a viable defense to foreclosure of the lien (*see Island Fed. Credit Union v. I&D Hacking Corp.*, 194 AD3d 482 [1st Dept 2021]). Moreover, as "the affirmative defenses are precluded, no discovery could lead to facts that would warrant denial of plaintiff's summary judgment motion" (*Bernstein v Dubrovsky*, 169 AD3d 410 [1st Dept 2019]).

As to the guarantor, "'[o]n a motion for summary judgment to enforce a written guaranty all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty'" (*see 4 USS LLC v DSW MS LLC*, 120 AD3d 1049, 1051 [1st Dept 2014], *quoting City of New York v Clarose Cinema Corp.,* 256 AD2d 69, 71 [1st Dept 1998]). Here, the affidavit submitted by Plaintiff and the supporting documents demonstrated a *prima facie* case for summary judgment against the guarantor. Notably, a guarantor cannot rely on any defenses personal to the borrower, except failure of consideration, which was not demonstrated here (*see I Bldg, Inc. v Hong Mei Cheung,* 137 AD3d 478 [1st Dept 2017]).

Turning to the cross-motion to dismiss, Plaintiff's status as a foreign limited liability company presents an issue of capacity, not standing. Defendants waived any reliance on the defense of lack of capacity by not including it in their answer or in a pre-answer motion to dismiss (*see* CPLR §3211[e]; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 280 [1st Dept 2006]). In any event, this type of deficiency is curable, as apparently occurred here, as Limited Liability Company Law §808[a] only effects a suspension of the ability to prosecute an action "unless and until such limited liability company shall have received a certificate of authority in this state" (*cf. 1700 First Ave. LLC v Parsons-Novak,* 46

Misc. 3d 30, 32 [App Term 1st Dept 2014]; *Acquisition Am. VI, LLC v Lamadore*, 5 Misc. 3d 461, 462 [Sup Ct NY Cty 2004]).

The branch of Plaintiff's motion for a default judgment against the non-appearing parties is granted without opposition (*see* CPLR §3215; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

The branch of Plaintiff's motion to amend the caption is granted without opposition (*see generally* CPLR §3025; *JP Morgan Chase Bank, N.A. v Laszio*, 169 AD3d 885, 887 [2d Dept 2019]).

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment against the appearing parties and for a default judgment against the non-appearing parties is granted; and it is further

ORDERED that Defendants' cross-motion is denied in its entirety, and it is

ORDERED that the affirmative defenses pled by all the appearing Defendants are dismissed; and it is further

ORDERED that **Jeffrey R. Miller, Esq, 32 Broadway, 13th Floor, New York, New York 10004, 212-227-4200** is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the property identified in the notice of pendency can be sold in parcels; and it is further

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

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

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

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

ORDERED that if the Referee holds a hearing, the Referee may seek additional compensation at the Referee's usual and customary hourly rate; and it is further

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

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

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

ORDERED, that that all the "Doe" Defendants are stricken as the New York County Clerk will not accept a judgment for filing with a "Doe" or "Name Refused" defendant in the caption; and it is further

ORDERED the caption is amended as follows:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK
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QPTF LLC,

Plaintiff,

-against-

224 SAPPHIRE LLC, BSD 777-57 LLC, BSD 65 LLC, 224 SHUR LLC, 224 W 57 LEASEHOLD LLC, ABRAHAM TALASSAZAN, BOARD OF MANAGERS OF THE 224 WEST 57 LEASEHOLD CONDOMINIUM, THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, THE NEW YORK CITY DEPARTMENT OF FINANCE, THE CITY OF NEW YORK, THE NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,

Defendants.
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and it is further,

ORDERED that Plaintiff must bring a motion for a judgment of foreclosure and sale within 45 days of receipt of the referee's report; and it is further

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

ORDERED that counsel for Plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street,

Room 119), who are directed to mark the court's records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)]; and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **October 30, 2025, at 10:40 a.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk (SFC-Part32-Clerk@nycourts.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

6/24/2025
DATE

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

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