[* 1]

SHORT FORM ORDER

INDEX No. 12-6251

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7/6/12
ADJ. DATES 7/20/12

Mot. Seq. # 001 - Mot D
CDISP Y____ N X

GREGLIN OLMEDA and CARMEN OLMEDA, Plaintiffs, -against- CARLOS CORREIA, ALVARO GONCALVES, VALD, LLC, LAGE INDUSTRIES CORP., ISLIP TOWN RECEIVER OF TAXES, ET ALS, Defendants.	RODNEY DRAKE, ESQ. Atty. For Plaintiffs 600 Johnson Ave. Bohemia, NY 11716 MASTROPIETRO-FRADE, LLC Attys. For Defendant Lage Indus. 190 Willis Ave. Mineola, NY 11501

Upon the following papers numbered 1 to 13 read on this motion for summary judgment, substitute and drop parities and to appoint referee; Notice of Motion/Order to Show Cause and supporting papers 1 - 5; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 6-7; Replying Affidavits and supporting papers 8-10; Other 11-12 (memorandum); 13 (affirmation); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by plaintiffs for an order: (1) awarding them summary judgment against the answering defendant, Lage Industries, Corp., and others; (2) substituting certain occupants found at the premises for unknowns named in the caption and/or otherwise deleting as party defendants certain named defendants; and (3) appointing a referee to compute amounts due under the subject mortgage, is considered under CPLR 3215, 3212 and RPAPL § 1321 and is granted only to the limited extent set forth below.

The plaintiffs, Greglin Olmeda and Carmen Olmeda, commenced this action to foreclose a July 8, 2004 purchase money mortgage given to them by defendants, Carlos Correia, Alvaro Gonclaves, and Vald, LLC, in connection with their purchase of commercial premises located in Bay Shore New York. The mortgage was recorded in the office of the Suffolk County Clerk on July 24, 2004. According to the complaint served and filed herein, the mortgagors defaulted in payment on January 10, 2010, in response to which, the plaintiffs accelerated the loan.

The plaintiffs commenced this action in 2012 seeking the foreclosure of the mortgage lien, the public sale of the property and recovery of deficiencies, if any be remaining after the sale, from the obligor defendants. Defendant, Lage Industries Corp., was joined herein as one of the non-mortgagor

defendants whom the plaintiffs characterize as having some interest in, or lien against, the mortgaged premises that is subsequent and subordinate to the mortgage lien of the plaintiffs.

Defendant, Lage Industries Corp., appeared herein by an answer containing four affirmative defenses. Lage's answer also contains one counterclaim wherein it seeks declaratory relief against the plaintiffs pursuant to RPAPL § 1501. Such relief includes a judicial declaration of the validity, extent and priority of each and every lien, including one purportedly arising from Lage's filing of a notice of pendency in accordance with a consent order issued in an action to recover diverted Lien Law trust assets commenced by Lage against the mortgagor defendants and others in 2011 (*see* ***Matter of Lage Indus.***, Index # 601884/2009, Nassau County, Supreme Ct.). Since Lage's filing of its notice of pendency against the subject premises predates the plaintiffs' filing of such a notice in connection with the commencement of this action, Lage demands a judgment declaring it has a "valid and subsisting lien against the premises" (*see* answer of defendant Lage attached as Exhibit C to plaintiffs' moving papers).

By the instant motion, the plaintiffs seek summary judgment on their complaint against, among others, answering defendant Lage and dismissal of its affirmative defenses and counterclaim for declaratory relief. A review of the moving papers reveals a sufficient establishment of a prima facie entitlement to summary judgment on the plaintiffs' complaint to the extent it asserts claims against defendant Lage, in as much as, they included copies of the mortgage, the unpaid note and evidence of a default under the terms thereof by the mortgagor defendants (*see* CPLR 3212; RPAPL § 1321; ***Countrywide Home Loans v Delphonse***, 64 AD3d 624, 883 NYS2d 135 [2d Dept 20090; ***Wells Fargo Bank Minnesota v Perez***, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]); ***Household Fin. Realty Corp. of New York v Winn***, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]; ***Ocwen Fed. Bank FSB v Miller***, 18 AD3d 527, 794 NYS2d 650 [2d Dept 2005]). Although the plaintiffs advance no other direct claims against defendant Lage, the prima facie establishment of the plaintiffs' claims for foreclosure and sale of the mortgaged premises concomitantly establishes the plaintiffs' implicit demands for the extinguishment, upon the public sale of the premises, of defendant Lage's claimed interest in the subject premises, as the plaintiffs' complaint describes such interest as subsequent and subordinate to the plaintiffs' mortgage.

It was thus incumbent upon answering defendant Lage Industries to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing of their entitlement to judgment on their complaint or in support of one or more of the affirmative defenses asserted in Lage's answer (*see* ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; ***J.P. Morgan Chase Bank, NA v Agnello,*** 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Wells Fargo Bank Minnesota Natl. Assn. v Perez,*** 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; ***Household Fin. Realty Corp. of New York v Winn***, 19 AD3d 545, *supra*; ***Charter One Bank, FSB v Houston***, 300 AD2d 429, 751 NYS2d 573 [2d Dept 2002]). A review of the opposing papers reveals, however, that no such question of fact was raised.

None of the pleaded affirmative defenses set forth in Lage's answer were asserted in opposition to the instant motion. Instead, three new defenses are advanced by Lage as a basis for a denial of the plaintiffs' motion for summary judgment. Defendant Lage first asserts that due to its filing of a notice

of pendency against the subject premises in 2011, well prior to the commencement of this action, it has a valid and subsisting lien against the mortgaged premises that is entitled to some unidentified priority over the mortgage lien of the plaintiffs. Lage's filing of the notice of pendency was the product of a so-ordered stipulation that settled a contempt application served in the prior action it commenced to recover diverted trust funds under Article 3-a of the Lien Law from the mortgagor defendants and others (*see* ***Matter of Lage Indus.***, Index # 601884/2009, Nassau County, Supreme Ct.). Defendant Lage contends that, at that time of the contempt settlement, it was unaware that the plaintiffs' mortgage was in default and it asserts that the plaintiffs' acceptance of mortgage payments from the mortgagor defendants or their agents constituted a diversion of trust funds for which the plaintiffs are liable to defendant Lage under Article 3-a of the Lien Law.

Defendant Lage further asserts that it would not have accepted the contempt settlement, the cornerstone of which was the filing of the notice of pendency, if it knew that the plaintiffs' mortgage was in default when said settlement was struck and said notice filed. By reason of such filing, the plaintiffs' purported receipt and application of diverted Lien Law trust funds to the payment of the subject mortgage and the plaintiffs' delay in commencing this action, defendant Lage claims that its is entitled to an outright denial of the plaintiffs' motion and dismissal of the complaint or a conditional denial pending a determination of Lage's counterclaim for a declaration regarding the priority of its claim of interest in the subject premises. For the reasons stated below, however, these contentions are rejected as unmeritorious.

Traditionally, mortgage lien priorities were governed by the priority of time as it was considered the priority of right. These rules were derived from common law principles that provided that the first transfer of property or an interest therein left the transferor with nothing left to convey so that a second transferee of the same property acquired no title or other interest therein (*see* 1 Mortgages and Mortgage Foreclosure in New York, § 8:9).

These concepts were altered with the adoption of New York's recording acts which date back to the 18th century and are currently codified in Article 9 of the Real Property Law (*see* ***Fort v Burch***, 6 Barb. 60, 66 [NY Gen. Term., 1849]; RPL § 290 *et. seq.*). Thereunder, a transferee, contract vendee or encumbrancer of property who qualifies as a good faith purchaser for value and who first records his or her conveyance, contract of sale or encumbrance will defeat prior unrecorded interests and most subsequently recorded interests whenever created. Since a mortgage is considered a "conveyance" under the recording acts, a mortgagee and its assignees may qualify as purchasers for value (*see* RPL §§ 290; 291). However, neither a judgment creditor nor a mechanic's lienor qualify as purchasers for value under the recording acts, although by statute, they generally enjoy priorities upon docketings or filings made under different statutes (*see* CPLR Article 52; Lien Law § 13[1]; 1 Mortgages and Mortgage Foreclosure in New York § 8:12). A mortgage first recorded thus enjoys presumptive priority over later recorded contracts, conveyances and encumbrances, judgments and mechanic's liens (*see* ***ABN AMRO Mtge. Group, Inc. v Pantoja***, 91 AD3d 440, 936 NYS2d 163 [1st Dept 2012]).

The provisional remedy afforded by the filing of a notice of pendency is governed by Article 65 of the CPLR and such remedy differs markedly from the protections afforded by the current provisions of New York's recording act. The purpose of a notice of pendency is to afford constructive notice from the time of its filing of a claim of interest in the subject premises so that any person who records a

conveyance, encumbrance or contract for sale after that time becomes bound by all of the proceedings taken in the action to which the notice relates (*see* ***2386 Creston Ave. Realty, LLC v M-P-M Mgt.***, 58 AD3d 158, 867 NYS2d 416 [1st Dept., 2008], quoting ***Corporation Bishop of Church of Jesus Christ of Latter–Day Saints v Solow Bldg. Corp.***, 52 AD2d 533, 534, 381 NYS2d 887 [1976]). Its effect is to bind, as if they were parties to the action, all persons whose conveyance, contract or encumbrance, whenever created, is recorded subsequent to the filing of the notice of pendency (*see* ***DLJ Mtge. Capital Inc. v Windsor***, 78 AD3d 645, 910 NYS2d 160 [2d Dept 2010]).

However, it is only those claimants having enforceable, superior interests in property that may bind others not joined as parties to the suit of such a claimant by the proper filing of a notice of pendency (*see* ***2386 Creston Ave. Realty, LLC v M-P-M Mgt.***, 58 AD3d 158, *supra*; ***Varon v Annino***, 170 AD2d 445, 565 NYS2d 540 [1991]). The filing of a notice of pendency does not create rights that do not already exist (*see* 11 Warren's Weed, New York Real Property § 115.04 [5th ed.]). The filing of a notice of pendency is thus no substitute for the recording of a contract of sale, conveyance or encumbrance (*see* ***Avila v Arsada Corp***, 34 AD3d 609, 826 NYS2d 322 [2d Dept 2006]; ***Varon v Annino***, 170 AD2d 445, *supra*). A party's failure to avail itself of the protections of RPL §§ 291 or 294 may not be cured by the filing of a notice of pendency since such notice has no effect upon the merits of a claimed property interest (*see* ***DLJ Mtge. Capital Inc. v Windsor***, 78 AD3d 645, *supra*; ***TCJS Corp. v Koff***, 74 AD3d 1188, 904 NYS2d 159 [2d Dept 2010]; ***2386 Creston Ave. Realty, LLC v M-P-M Mgt.***, 58 AD3d 158; *supra*; ***Avila v Arsada Corp***, 34 AD3d 609, *supra*; ***Varon v Annino***, 170 AD3d 445, *supra*).

Here, the plaintiff's mortgage was given and recorded in July of 2004, some seven years prior to the accrual of defendant Lage's claim of some interest in the subject premises and the filing of its notice of pendency. The plaintiffs' mortgage lien thus has priority over all unrecorded prior interests about which plaintiffs had no notice and all subsequently recorded interests. Defendant Lage's subsequent filing of a notice of pendency upon its acceptance of the 2011 settlement of its contempt claim in the trust diversion action, which did not involve a claim against the mortgaged premises, did not affect the priority of the plaintiffs' previously recorded mortgage. Indeed, it is defendant Lage who is chargeable with constructive notice of the existence of such mortgage, by virtue of the recordation of plaintiffs' mortgage prior to Lage's receipt of the so-ordered settlement stipulation wherein the defendants consented to Lage's filing of a notice of pendency against the subject premises in exchange for the posting of security previously directed by the court in the Nassau County trust fund diversion action. Assuming, without so finding, that the notice of pendency filed by Lage was a proper use of the provisional remedy afforded by a notice of pendency (*see* CPLR 6512; ***Security Pac. Mtge. and Real Estate Serv., Inc. v Republic of Philippines***, 962 F2d 204 [C.A.2 NY 1992]), the recent award of judgment in favor of Lage in the trust diversion action clearly provides an independent ground for the rejection of the claims advanced by Lage in opposition to this summary judgment motion by the plaintiffs (*see* CPLR 6514[a]).

Lage's contentions that the plaintiffs' motion should be denied because the plaintiffs purportedly received diverted trust funds belonging to Lage and applied them the payment of the mortgage in violation of various provisions of Lien Law Article 3-a are rejected as unmeritorious. These claims are not asserted in the answer of defendant and their assertion here in opposition to the plaintiffs' motion are unavailing as they do not preclude the plaintiffs' prosecution of their claims for foreclosure and sale

(*see* ***Neighborhood Hous. Serv. of New York City***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). Also unavailing are Lage's claims that the doctrine of laches should be applied to bar the plaintiffs' recovery of the relief demanded on this motion for an accelerated judgment against defendant Lage in this foreclosure action. The doctrine of laches is not available to defeat a foreclosure action brought within the statutory period of limitations (*see* ***New York State Mtge. Loan Enforcement and Admin. Corp. v North Town Phase II Houses, Inc.***, 191 AD2d 151, 594 NYS2d 183 [1st Dept 1993]; ***Schmidt's Wholesale, Inc. v Miller & Lehman Const.***, 173 AD2d 1004, 569 NYS2d 836 [3d Dept 1991]).

Under these circumstances, those portions of this motion by the plaintiffs for summary judgment dismissing the affirmative defenses and counterclaim of defendant Lage Industries and for judgment on its complaint against Lage for foreclosure and sale are granted. Pursuant to RPAPL 1501, the court declares that defendant Lage has no valid and subsisting lien or interest in the mortgage premises arising from its filing of the 2011 notice of pendency that is prior or of equal priority to the plaintiffs' mortgage lien. However, the plaintiffs' demands for an order cancelling the notice of pendency are denied without prejudice to the interposition of an application therefor to the court presiding over the Nassau County trust diversion action, out of which, the authority to file such notice emanated (*see* CPLR 6514).

Also granted are those portions of this motion wherein the plaintiffs seek to substitute Juan Pedrie in place of "John Doe #1"; Edwin Echenique in place of "John Doe #2"; Marlon Campos Henriquez in place of "John Doe # 3"; Esperanza Villatoro in place of "Jane Doe # 1"; Ruth Ponce in place of "Jane Doe # 2"; Meradre Ponce in place of "Jane Doe # 3"; and Debra Lopez Ponce in place of "Jane Doe # 4". Likewise granted is the plaintiffs' request to delete as party defendants the remaining unknown defendants set forth in the caption. The caption of this action is thus amended to reflect the substitution of these defendants and the deletion of the unknown defendants and all future proceedings shall be captioned accordingly.

Those portions of the instant motion wherein the plaintiffs seek summary judgment against the mortgagor defendants is denied. The remedy of summary judgment is available only in cases in which issue has been joined by service of an answer by the targeted defendant and where copies of the pleading served accompanied the motion (*see* CPLR 3212[a];[b]; ***Shaibani v Soraya***, 71 AD3d 1121, 898 NYS2d 72 [2d Dept 2010]; ***Enriquez v Home Lawn Care and Landscaping, Inc.***, 49 AD3d 496, 854 NYS2d 410 [2d Dept 2008]). Since it appears from the record that issue has not be joined by service of an answer on the part of the mortgagor defendants, the plaintiffs are precluded from seeking summary judgment against said defendants (*see* ***115-41 St. Albans Holding Corp. v Harrisson***, 71 AD3d 653, 894 NYS2d 896 [2d Dept 2010]; ***Enriquez v Home Lawn Care and Landscaping, Inc.***, 49 AD3d 496, *supra*). The plaintiffs' demands for summary judgment against all other defendants is likewise denied, as the court is without proof of their appearances by answer and without copies of any answers filed by such defendants.

The plaintiffs' application for the appointment of a referee to compute is also denied. It is well established that the appointment of a referee to compute as contemplated by RPAPL § 1321 is not appropriate unless the claims of the plaintiff have been adjudicated in its favor by the court and the only issues left for determination are those concerning the long account (*see* ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [2d Dept 1996]). Favorable adjudications of the claims of the

plaintiffs may be made by the fixation of defaults in answering or by an award of summary judgment on its complaint against the defendants (*see* ***Bank of East Asia Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, *supra*; ***Perla v Real Prop. Holdings, LLC***, 23 Mics2d 697, 874 NYS2d 873 [Sup Ct. Kings County 2009]; ***HSBC Mtge. Serv., Inc. v Alphonso***, 16 Misc3d[A], 2007 WL 2429711 [Kings County Supreme Court, 2007]). Until the plaintiffs' claims against all of the defendants joined in the foreclosure action have been so adjudicated, an application for the appointment of a referee to compute is premature (*see* RPAPL § 1321; ***Sharaga v Schwartzberg***, 149 AD2d 578, 540 NYS2d 451 [2d Dept 1989]).

Here, the plaintiffs' motion papers did not include a demand for a default judgment against the non-answering defendants with the requisite elements of proof required by CPLR 3215 (f), including proof of service of the summons and complaint upon some of those defendants, including the Town of Islip. The moving papers also failed to establish whether appearances by service of answers or otherwise were interposed by the municipal defendants or by the newly identified occupants served at the mortgage premises. Under these circumstances, the court denies the plaintiffs' motion for the appointment of a referee pursuant to RPAPL § 1321 as the same is premature. Said denial is without prejudice to the interposition of a new application for the fixation of the defaults of all non-answering defendants pursuant to CPLR 3215 (f) and (g) and the appointment of a referee to compute as contemplated by RPAPL § 1321. Any such application shall include a copy of this order, as the award of summary judgment in favor of the plaintiffs against answering defendant, Lage Industries, Corp., set forth herein is a necessary component of any future application for the issuance of an order of reference.

In view of the foregoing, the instant motion is granted only to the extent set forth above. A copy of *this order must accompany any future application* for an order fixing the defaults of the defendants who have not answered and for an order of reference by virtue of all accelerated judgments granted to the plaintiffs pursuant to CPLR 3212 and 3215.

Proposed order granting summary judgement and appointing referee to compute has been marked "not signed" without prejudice.

DATED: 8/1/12

THOMAS F. WHELAN, J.S.C.