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SHORT FORM ORDER

INDEX No. 27095-11

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 1/31/12
ADJ. DATES 8/10/12
Mot. Seq. # 001 - MG; Sub Order
Mot. Seq. # 002 - XMD
Mot. Seq. # 003 - XMD
CDISP Y____ N X

CAPITAL ONE, NA, successor by merger to NORTH FORK BANK,

Plaintiff,

-against-

ISLANDER BOAT CENTER, INC., JOHN SCOGLIO, TEXTRON FINANCIAL CORPORATION, BRUNSWICK CORPORATION, BRUNSWICK FAMILY BOAT COMPANY, INC., BERGEN POINT YACHT BASIN, INC., HWJ ENGINEERING AND SURVEYING, PLLC, NELSON & POPE ENGINEERS & LAND SURVEYORS, PC, "JOHN DOE No. 1" to "JOHN DOE No. 30", inclusive, the last thirty names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment among other things and cross motions for summary judgment and a stay; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notices of Cross Motion and supporting papers 4-8; 9-12; Answering Affidavits and supporting papers 13-14; 15-16; Replying Affidavits and supporting papers 17-18; 19-20; 21-22; 23-24; Other 25 (memorandum); 26 (memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that those portions this motion (#001) by the plaintiff for summary judgment on its complaint in this mortgage foreclosure action against the answering defendants; the fixation of the defaults of the non-answering defendants joined herein by service of process; dropping as party defendants the unknown defendants listed in the caption and an amendment of the caption to reflect same; a further amendment of the caption to reflect the proper corporate names of the engineer defendants; and

an order appointing a referee to compute amounts due, are considered under CPLR 3212; 3215; 1003; and RPAPL 1321 is granted only to the extent set forth below; and it is further

ORDERED that the remaining portions of this motion (#001) wherein the plaintiff seeks a severance of the cross-claims interposed by defendants, HWJ Engineering and Surveying, PLLC and Nelson & Pope Land Surveyors, P.C. (hereinafter referred to collectively as "engineer defendants"), is considered under CPLR 3212 and 603 and is granted; and it is further

ORDERED that the cross motion (#002) by the engineer defendants for summary judgment on the cross claims against defendants, Islander Boat Center, Inc. and John Soglio, is considered under CPLR 3212 and Article 3 of the Lien Law and is denied; and it is further

ORDERED that the cross motion (#002) by defendants, Islander Boat Center, Inc., Scoglio and Bergen Point Yacht Basin, Inc., for a stay or adjournment of the above described applications is denied.

ORDERED that the caption of this action is amended to delete therefrom the names of the unknown defendants and to reflect the proper names of HWJ Engineering and Nelson & Pope Engineers as follows: HWJ Engineering and Surveying, PPLC d/b/a Hawkins, Webb, Jaeger Architects, Engineers, Surveyors & Planners; N&P Engineers & Land Surveyor, PLLC d/b/a Nelson & Pope Engineers and Surveyors.

The plaintiff commenced this action to foreclose two mortgages given on real property situated in the Village of Port Jefferson New York by defendant, John Scoglio, in February of 2005 and in May of 2005. The first of such mortgages was given to secure a re-stated promissory note executed by defendant Scoglio, in favor of the plaintiff's predecessor-in-interest by merger, in the amount of $1,250,000.00, which amount reflected the consolidation and extension of prior mortgages then securing the subject premises. The Second mortgage was a credit line mortgage given on May 19, 2005 by defendant Scoglio to secure a credit line note in the maximum amount of $250,000 executed by defendant, Islander Boat Center, Inc., in favor of the plaintiff's predecessor-in-interest. Defendants, Islander Boat Center Inc. and Bergen Point Yacht Basin, Inc., are the guarantors of the obligations of the originator of the first note while defendants, Scoglio and Bergen Point Yacht Basin Inc., are the guarantors of the obligations of the originator of the second, credit line note. The first of the plaintiff's mortgages was recorded in the office of the County Clerk on March 14, 2005, while the Second mortgage was recorded on July 14, 2005.

Paragraph 16 of the Second Mortgage expressly states that said mortgage is subject and subordinate to the February 10, 2005 mortgage lien owned by the plaintiff, the single lien of which in the amount of $1,250,000.00 was formed by a Consolidation, Extension and Spreader Agreement executed by defendant Scoglio on February 10, 2005 that was recorded with other mortgage documents on March 14, 2005 in the office of the County Clerk. Notwithstanding this language, whereby the second and subordinate nature of the Second mortgage to that of the First was expressly preserved, the plaintiff seeks the foreclosure of both mortgages in this foreclosure action together with a recovery of deficiency judgments against all obligors, including the guarantors (*see* Wherefore of Complaint attached as Exhibit E to the moving papers). Defaults in payment under the terms of the First mortgage allegedly occurred on May 1, 2011 while a default in payment under the terms of the Second mortgage allegedly occurred on April 1, 2011 (*see* Complaint ¶¶ 8 and 18).

The record reflects that two of the three obligor defendants, namely, Scoglio and Islander Boat Center, Inc. [hereinafter "Islander"], have appeared by answer as have the engineer defendants, HWJ Engineering and Nelson & Pope Engineers [hereinafter "HWJ" and "N & P"or "engineer" defendants]. The record contains no evidence of an appearance by defendant, Bergen Point Yacht Basin Inc. [hereinafter "Bergen Point"], by answer or otherwise, although it purports to join in the cross motion of the other obligor defendants (*see* Notice of cross motion #003). Defendant, Textron Financial Corporation, appeared herein by counsel without answering and is thus in default as are all other known defendants listed in the caption, including Bergen Point.

The joint answer of the obligor defendants, Islander and Scoglio, contains neither affirmative defenses nor counter or cross claims. The answer of the engineer defendants contains four cross claims against defendant, Islander Boat Center, Inc. Therein, each of said defendants seek foreclosure of their respective mechanics' liens that were filed against the subject premises on December 9, 2010 and recovery of costs including counsel fees in amounts provided under the terms of their respective contracts with defendant Islander.

By the instant motion, the plaintiff seeks summary judgment on its complaint against the answering defendants and an order fixing the defaults of all other known defendants. The plaintiff also seeks an order dropping as party defendants the unknown defendants listed in the caption and its amendment to reflect same as well as an amendment to reflect the proper names of the engineer defendants. The plaintiff further seeks an order severing the cross claims of the engineer defendants and an order appointing a referee to compute amounts due under both mortgages.

Both sets of cross moving defendants appeared in response to the plaintiff's motion and cross move for relief in their favor. The engineer defendants oppose only those portions of the plaintiff's motion wherein it seeks a severance of the engineer's cross claims against defendant Islander Boat Center, Inc. and they cross move for summary judgment on such claims. The answering obligor defendants together with non-answering defendant, Bergen Point Yacht Basin Inc., cross move for a stay or adjournment of the plaintiff's motion and cross motion of the engineer defendants pending approval of a site plan for the mortgaged premises and a sale thereof under the terms of existing contract with a developer.

Easily dispatched as unmeritorious is the cross motion (#003) of the obligor defendants. The cross moving papers do not challenge the default in payment of amounts due under the subject notes and mortgages as alleged by the plaintiff or the validity of the loan documents, the priorities they purportedly enjoy over the interests of all other defendants, or the plaintiff's entitlement to the remedies of foreclosure and sale and to obtain deficiency judgments. Instead, the obligor defendants merely seek a stay or an adjournment of the plaintiff's motion and cross motion of the engineer defendants' for a sufficient time to satisfy the site plan approval conditions imposed in the contract for the sale of the mortgaged premises entered into by defendant Scoglio and his conditional purchaser. However, it is well settled law that an impending sale of premises that are the subject of a mortgage foreclosure action is not a defense to such action and thus does not impair the mortgagee's pursuit of its contractual remedy (*see* ***Bank of New York v Agenor***, 305 AD2d 438, 758 NYS2d 817 [2d Dept. 2003]). It thus provides no basis for a stay of a foreclosure action or an adjournment of a motion for accelerated judgments interposed by the plaintiff in such an action. In any event, the plaintiff has graciously afforded the obligor defendants ample time to effect any and all plans to satisfy the indebtedness owing to the plaintiff by the long adjournment of

this motion shortly after its interposition. The cross motion (#003) by the obligor defendants is thus denied.

Also denied is the cross motion (#002) by the engineer defendants for summary judgment on their cross claims against defendant Islander for foreclosure of the mechanics' liens filed by said engineer defendants. The liens allegedly arise from the engineer defendants' supply and installation of labor and materials in connection with site engineering and architectural services and other engineering service in connection with proposed development of the mortgaged premises. Separate notices of the lien were filed by each of the engineer defendants on December 9, 2010. Such filing postdates the recording of the plaintiff's mortgages by some five years but precedes the filing of the plaintiff's notice of pendency by some eight months.

The engineer defendants' demands for foreclosure of their mechanics liens are advanced solely against the property owner, defendant Islander, by way of the cross claims set forth in the answer of the engineer defendants. Therein, the engineer defendants allege that their mechanics' liens have priority over all other asserted claims and liens against the property (*see* ¶¶ 30 and 51 of the Answer of the engineer defendants). However, the engineer defendants did not counterclaim against the plaintiff and thus did not join the plaintiff as a party to their claims for foreclosure of their mechanics' liens and their implicit demand for a judicial confirmation of the priority of the mechanics' liens. The absence of a counterclaim against the plaintiff left it without an opportunity to serve reply pleadings in which it could contest the engineer's claims of priority.

The failure to join the plaintiff and all others having prior interests or liens in the subject premises, the existence of which is contemplated by the engineer defendants' answer, warrants a denial of their cross motion for summary judgment on their cross claims for foreclosure. While this court is empowered to determine lien priorities in an action to foreclose a mechanics' lien (*see* ***LMT Capital Mgt. LLC, v Gerardi***, 97 AD3d 546, 947 NYS2d 338 [2d Dept 2012]), the absence of the joinder of those whose liens or interests may be adversely affected by the court's determination renders the judgment entered upon such determination ineffectual as to all non-joined, necessary parties (*see* ***NYCTL 1998-2 Trust v Salem Realty***, 69 AD3d 592, 893 NYS2d 165 [2d Dept 2010]; ***1426 46 St., LLC v Klein***, 60 AD3d 740, 742, 876 NYS2d 425 [2d Dept 2009]; ***Board of Mgrs. of Parkchester N. Condominium v Alaska Seaboard Partners Ltd. Partnership***, 37 AD3d 332, 831 NYS2d 370 [1st Dept 2007]; ***6820 Ridge Realty v Goldman***, 263 AD2d 22, 701 NYS2d 69 [2d Dept 1999]). The waste of the judicial and other resources expended in such an exercise in futility is obvious, particularly where, as here, there are competing claims of priority against parties not joined to the claim of priority. The court thus denies the cross motion by the engineer defendants for foreclosure of their allegedly prior and superior mechanics' liens.

Those portions of the plaintiff's motion wherein it seeks an order dropping as party defendants the unknown defendants listed in the caption and its amendment to reflect same as well as an amendment to reflect the proper names of the engineer defendants for such relief are granted, there being no opposition thereto. Accordingly, the caption is amended to delete therefrom the names of the unknown defendants and to reflect the proper names of HWJ Engineering and Nelson & Pope Engineers as follows: HWJ Engineering and Surveying, PPLC d/b/a Hawkins, Webb, Jaeger Architects, Engineers Surveyors & Planners; N&P Engineers & Land Surveyor, PLLC d/b/a Nelson & Pope Engineers and Surveyors.

Those portions of the plaintiff's motion wherein it seeks summary judgment on its claims for foreclosure and sale of its two mortgages of unequal priority is granted to the extent hereinafter set forth.

It is well settled law that a mortgagee establishes a prima facie case for foreclosure of a mortgage lien by presenting the subject mortgage, the unpaid note and due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; ***Baron Assoc., LLC v Garcia Group Enter.***, 96 AD3d 793, 946 NYS2d 611 [2d Dept 2012]; ***Archer Capital Fund, L.P. v Eagle Realty, LLC***, 95 AD3d 799, 942 NYS2d 902 [2d Dept 2012]; ***Washington Mut. Bank v Valencia***, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]; ***Swedbank, AB v Hale Ave. Borrower, LLC***., 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; ***Capstone Bus. Credit, LLC v Imperia Family Realty, LLC***, 70 AD3d 882, 895 NYS2d 199 [2d Dept 2011]; ***Countrywide Home Loans v Delphonse***, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]). Claims for a deficiency judgment based upon written guarantees of payment are similarly established, prima facie, by the production of the underlying agreements and evidence of a default on the part of a guarantor defendant (*see* ***Archer Capital Fund, L. v GEL, LLC***, 95 AD3d 800, 944 NYS2d 179 [2d Dept 2012]).

Here, the moving papers submitted by the plaintiff demonstrated each of the forgoing elements necessary to establish prima facie case for the foreclosure of both mortgages. It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of the affirmative defenses asserted in the answers, if any, or others available to such defendants (*see* ***Citibank, NA v Van Brunt Prop., LLC***, 95 AD3d 1158, 945 NY2d 330 [2d Dept 2012]; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***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]; ***Household Fin. Realty Corp. of New York v Winn***, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]). The record reveals that none of the parties appearing in opposition raised any question of fact sufficient to rebut the plaintiff's prima facie showing by the establishment of some bona fide defense thereto.

Nevertheless, the plaintiff's moving papers failed to identify on which of the several causes of action set forth in the complaint it seeks summary judgment against the answering defendants. For example, the plaintiff separately advances in its First cause of action a claim for foreclosure of the Second mortgage dated May, 19 2005 and an adjudication of the liability of the guarantors of the obligations to the plaintiff in an amount equal to any deficiency remaining after a sale of the mortgaged premises. In its Second cause of action, the plaintiff seeks foreclosure of the its prior consolidated mortgage dated February 10, 2005 and a money judgment against the guarantors of the borrower's obligation equal to the amount of any deficiency remaining in payment to the plaintiff after the public sale of the premises. The Third cause of action is dedicated to demands for recovery of attorneys fees under the mortgage loan documents governing both mortgages. In its Fourth cause of action, the plaintiff seeks declaratory relief whereby the second and expressly subordinate mortgage is elevated by judicial declaration to be of the same priority as the First mortgage.

The next two causes of action set forth in the complaint are both labeled "Fifth". In the first of the two Fifth causes of action, the plaintiff seeks a judgment of foreclosure and sale which expressly directs and authorizes two consecutive foreclosure sales, the first with respect to the foreclosure of the Second mortgage with the second to follow immediately thereafter in conjunction with foreclosure of the First mortgage. In the second cause of action labeled Fifth, the plaintiff seeks a judgment foreclosing

only the Second mortgage. Nowhere in its moving papers does the plaintiff expressly identify on which of its several pleaded causes of action, summary judgment is sought. The failure to do is problematic even in the absence of opposition since, as stated below, some of the causes of action advanced in the plaintiff's complaint are inconsistent or premature with respect to others.

It is well established that foreclosure of a First mortgage extinguishes the foreclosure rights of owners of subordinate mortgages[1] who have been jurisdictionally joined as party defendants to the action and relegates such owners to the remedies, if any, that are available in surplus money proceedings of the type contemplated by RPAPL § 1371. The rule is dictated by the underlying function of a foreclosure action, namely, "to extinguish the rights of redemption of all who have subordinate interests in the property and to vest complete title in the purchaser at the judicial sale" (***Polish Natl. Alliance of Brooklyn, U.S.A. v White Eagle Hall Co., Inc.***, 98 AD2d 400, 470 NYS2d 642 [2d Dept 1983]; *see also* ***Board of Mgrs. of Parkchester N. Condominium v Alaska Seaboard Partners Ltd. Partnership***, 37 AD3d 332, *supra*; ***New Falls Corp. v Board of Mgrs. of Parkchester N. Condominium, Inc.***, 10 AD3d 574, 782 NYS2d 425 [1st Dept 2004]).

Where two or more co-existing, alternative remedies are pursued at trial or beforehand on an application for an accelerated judgment pursuant to CPLR Article 32, the election of remedies doctrine bars their continued, simultaneous prosecution and requires the plaintiff to elect one over the others (*see* ***331 E. 14th St., LLC v 331 E. Corp.***, 293 AD2d 361, 740 NYS2d 327 [1st Dept 2002]; ***Jones Lang Wootten, USA v Leboeuf, Lamb, Greene & MacRae***, 243 AD2d 168, 674 NYS2d 280 [1st Dept 1998]). Here, it is apparent that the plaintiff's demands for foreclosure of both its First and Second mortgages are demands for remedies which are inconsistent and/or mutually exclusive. The granting of accelerated judgments on both of these claims in the February 28, 2012 order issued on the plaintiff's prior motion for judgment violated the election of remedies doctrine.

The court acknowledges that at least one commentator suggests that the foreclosure of two or more mortgages having different priorities may be sought by the owner of such mortgages in one action under certain limited circumstances (*see* Bergman on New York Mortgage Foreclosures § 2.07 pp. 2-26.6). The first circumstance is where the plaintiff asks the court for a judgment declaring the mortgages to be of equal priority. A separate cause of action for such relief would, of course, be required as would the jurisdictional joinder of all necessary parties to such a cause of action as contemplated by RPAPL §§ 1501 and 1511 and conformity with the pleading requirements of RPAPL § 1515. Intervening encumbrancers would have to be joined as party defendants since their rights would be adversely affected by any judgment granting the declaratory relief requested by the plaintiff.

Here, the plaintiff's complaint contemplates the first of the above described scenarios as it includes a cause of action for declaratory relief by which the subordinate nature of the priority of the Second mortgage would be eradicated by a judicial declaration that they are of the same priority. A showing of an entitlement to such relief must, however, be established by the plaintiff on a motion for accelerated judgments pursuant to CPLR 3212 and 3215 in accordance with the dictates of those rules together with a demonstration that all persons having an interest is such declaration have been joined as

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[1]Unaffected are the rights of subordinate mortgagees to sue on their notes and any and all guarantees thereof (*see* RPAPL 1301).

a party defendants or that no such persons exist. The plaintiff's failure to address, let alone advance, grounds establishing, in the first instance, viable claims to the declaratory relief necessary to simultaneously foreclose the subject mortgages of unequal priority in one public sale warrants a denial of the plaintiff's demands for foreclosure of both mortgages and a single judicial sale of the mortgaged premises that is contemplated in the Fourth cause of action set forth in the complaint.

The second circumstance contemplated is one in which the foreclosure of two or more mortgages of unequal priorities is demanded in separate causes of action with the junior mortgage set forth in the First cause of action. However, even in these circumstances, the plaintiff must expressly seek, and the court must direct, that the sale in conjunction with the foreclosed junior mortgage proceed first, leaving "foreclosure of the senior mortgage to occur immediately thereafter" (*see* Bergman on New York Mortgage Foreclosures § 2.07 p 2-26.6). The complaint must thus contain demands for consecutive public sales of the property upon the foreclosure of each mortgage, beginning with the Second mortgage. The court can then direct separate awards of judgments of foreclosure; separate appointments of referees to compute amounts due under each mortgage and directives to conduct the separate sales; awards of separate fees earned by each referee; and the issuance of separate notices and terms of sale, all of which are aimed properly effecting the two consecutive public sales of the property.

Here, the plaintiff's complaint separately advances claims for the foreclosure of both mortgages and a separate cause of action for a judgment directing separate consecutive separate sales the mortgaged premises beginning with the sale associated with the Second mortgage to be followed by a second sale resulting from the foreclosure of the First mortgage. These claims fit squarely within the scenario outlined above. The additional directives such as separate awards of judgment of foreclosure as to each mortgage, distinct appointments of a referee to compute amounts due under each mortgage and awards of fees incurred thereby are incidental matters which the court may require so to afford complete relief in this action which is equitable in nature (*see* ***LMT Capital Mgt. LLC v Gerardi***, 97 AD3d 546, *supra*). Such matters shall be specifically provided for in the judgment of foreclosure and sale to be entered herein.

Under these circumstances, the court finds that the plaintiff is entitled to the following relief: summary judgment on the First cause of action labeled First, Second, Third and Fifth wherein it seeks foreclosure of its Second mortgage, foreclosure of its First mortgage, an award of counsel fees incurred in the prosecution of this single action and a judgment directing separate, consecutive public sales of the property in beginning with the sale arising from foreclosure of the Second mortgage, to be followed by a second sale upon the foreclosure of the First mortgage, provided that separate notices and terms of sale are issued with respect to each sale. The plaintiff is also entitled to default judgments with respect to these causes of action as to any non-answering defendants (*see* CPLR 3215; RPAPL § 1321). Since the plaintiff has been awarded summary judgment against the sole answering defendant and has established a default in answering by the remaining defendants, the plaintiff is entitled to an order appointing referees to compute amounts due under both the First and Second mortgages at issue in this action (*see* RPAPL § 1321; ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Perla v Real Prop. Holdings, LLC***, 23 Misc3d 697, 874 NYS2d 873 [Sup Ct. Kings County 2009]).

The plaintiff's demands for a severance of the cross claims of the engineer defendants, which are limited to defendant, Islander, are also granted, as such claims are unrelated to those upon which the

plaintiff has been awarded accelerated judgments on its complaint against all defendants (*see* CPLR 3212 (f)). The order of reference to be entered hereon shall include a copy of this order and it shall reflect the severance and continuation of said cross claims. It shall further provide, in blank, for the appointment of separate referees to compute amounts due under the mortgages for which foreclosure is sought herein. It shall also reference the special provisions which the judgment of foreclosure must contain as directed below.

The judgment of foreclosure and sale to be entered in this action shall include a copy of this order and it shall reflect the severance and continuation of said cross claims. Said judgment shall further include separate awards of judgment of foreclosure as to each mortgage; two distinct appointments of a referee conduct a public sale under each mortgage and separate awards of fees incurred thereby.. The judgment shall further direct the issuance of separate notices and terms of sale and the holding of consecutive; separate public sales of the property, beginning with sale associated with the foreclosure of the Second mortgage to be followed, immediately, by the sale associated with foreclosure of the First mortgage.

The proposed order submitted by the plaintiff on this motion that is attached to its moving papers has been marked "not signed" as it does not accurately reflect the terms of this order with respect to relief granted and denied by the court on the motions herein decided. The plaintiff is thus directed to submit, upon a copy of this order, a proposed "Order Appointing Referees to Compute Amounts Due", providing in blank, for the appointment of separate referees to compute amounts due under the mortgages for which foreclosure is sought herein. Said order shall also reference the special provisions which the judgment of foreclosure must contain as set forth above.

DATED: 9/14/12

THOMAS P. WHELAN, J.S.C.