[* 1]

MEMO DECISION/SHORT FORM ORDER

INDEX No. 061874/2013

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

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/12/14
SUBMIT DATE: 6/20/14
Mot. Seq. # 001 - MG
CDISP: NO

HAYDEN ASSET V, LLC Plaintiff -against- JGBR, LLC, INSURENEWYORK AGENCY, LLC, ELLIOTT WR GOLF, LLC, HURNEY WR GOLF, LLC, DEMPSEY WR GOLF, LLC, WALSH WR GOLF, LLC, FAIRWAY ROCK, LLC, GREAT ROCK GOLF 2006, LLC, WADING RIVER CATERING, LLC, JOHN BONLARRON, PAUL ELLIOTT, JAMES McGUIRK, WALTER T. HURNEY, JOSEPH DEMPSEY, MARK WALSH, THOMAS F. COSTELLO, DOUGLAS PIERCE, FORRESTER PIERCE, GREGORY PIERCE AND JOHN DOE #1 through JOHN DOE #12, the last 12 names being fictitious and unknown to the plaintiff, the persons and parties intended being tenants, occupants, persons, or corporations, if any, having an interest upon the premises described in the complaint, Defendants.	KRISS & FEUERSTEIN, LLP Attys. For Plaintiff 360 Lexington Ave. - Ste. 1200 New York, NY 10017 LaMONICA, HERBST ET AL Attys. For Def. Hurney & Hurney WR 3305 Jerusalem Ave. Wantagh, NY 11793 SILVERMAN, ACAMPORA, LLP Attys. For Defs. Walsh WR & Walsh 100 Jericho Quad. - Ste. 300 Jericho, NY 11753 WICKHAM, BRESSLER & GEASA Attys. For Defs. Elliot WR, Great Rock Wading River Catering & Elliott PO Box 1424 Mattituck, NY 11952 WEINBERG, GROSS ET AL Attys. For Defs. Bonlarran, McGuirk, JGBR, InsureNewYork Agency 400 Garden City Plaza - Ste. 403 Garden City, NY 11530 BRACKEN, MARGOLIN ET AL Attys. For Def. Dempsey 1050 Old Nichols Rd. - Ste. 200 Islandia, NY 11759 PINKS, ARBEIT & NEMETH Attys. For Defs. Costello, D. Pierce, F. Pierce, G. Pierce 140 Fell Ct. - Ste. 303 Hauppauge, NY 11788

AD

Upon the following papers numbered 1 to ___ read on this motion by the plaintiff for accelerated judgments the appointment of a referee to compute and other incidental relief: Notice of Motion and supporting papers: 1-4 ; Notice of Cross Motion and supporting papers _____; Answering papers 5; 6-7; ____; Reply papers 8-9 _____; Other 10 (defendants Hurney memorandum in opposition); 11 (plaintiff's memorandum of law in support); 12 (plaintiff's reply memorandum in further support); 13-14 (plaintiff's reply memorandum in support); 15 (defendants Walsh memorandum in opposition) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff for summary judgment dismissing the answers and affirmative defenses of the defendants who appeared herein by way of answer; default judgments against the non-answering defendants, the identification of two unknown defendants and the deletion of the remaining unknown defendants, as well as, certain amendments to the pleadings to correct errors in the names of some parties, including the name of the mortgagor defendant, JBGR, LLC, in all captions and papers and an amendment of the caption to reflect these changes is considered under CPLR 3212, 3215, 1024, 305 and RPAPL 1321 and is granted.

In this commercial mortgage foreclosure action, the plaintiff seeks to foreclose the lien of a June 29, 2010 mortgage given by defendants, JBGR LLC (incorrectly denominated as JGBR, LLC in the caption), and InsureNewYork Agency LLC, Elliott WR Golf LLC, Hurney WR Golf LLC, Dempsey WR Golf LLC, Walsh WR Golf, LLC [hereinafter the mortgagor defendants], to secure a consolidate mortgage note of $6,395,000.00 by the mortgagor defendants that encumbered several properties. The plaintiff also seeks deficiency judgments against the note obligors and against defendants, Paul Elliot, John Bonlarron, James McGuirk, Walter T. Hurney, Joseph Dempsey, and Mark Walsh, under the terms of their separate Limited Continuing Guaranty and against Fairway Rock LLC, Great Rock Golf 2006 LLC and Wading River Catering LLC, each of whom executed an Unlimited Continuing Guaranty of the obligations of the mortgagor defendants under the loan documents. In its Second Amended verified complaint, the plaintiff alleges that a default in the payment obligations of the mortgagor defendants occurred on June 29, 2013, the maturity date of the mortgage note and that such default continues without abatement by such mortgagors or any of the guarantors.

Issue was joined by the service of answers to the plaintiff's first and second amended answers by the following four sets of defendants: 1) Mark J. Walsh and Walsh WR Golf LLC [hereinafter, Walsh defendants]; 2) JGBR LLC, InsureNewYork Agency LLC, John Bonlarron and James McGuirk; 3) Paul Elliott, Elliott WR Golf LLC, Great Rock Golf 2006 LLC and Wading River Catering LLC [hereinafter the Elliott defendants]; and 4) Walter T. Hurney and Hurney WR Golf LLC [hereinafter the Hurney defendants]. Defendants, Costello and the three Pierce defendants, who are described as subsequent judgment creditor lienors appeared herein without answering in February of 2014 by a notice of appearance served by their counsel. The remaining defendants served with process, including Blackwell's Restaurant and Great Rock Golf Club, who were served as John Doe numbered 1 and 2, failed to appear herein by answer or otherwise.

By the instant motion (#001), the plaintiff seeks summary judgment dismissing the answer and affirmative defenses served by the answering defendants and summary judgment on its complaint against the answering defendants. In addition, the plaintiff seeks default judgments against the non-

answering defendants, including the judgment creditor defendants who appeared herein by notice of appearance and Blackwell's Restaurant and Great Rock Golf Club who were served as the first two John Doe defendants listed in the caption. In addition, the plaintiff seeks the incidental relief regarding party identification and deletion and the amendments of the certain papers and the caption of this action to correct the "scrivener's errors as outlined above. The motion is separately opposed only by the Hurney defendants, the Elliott defendants and by the Walsh defendants. For the reasons stated below, the motion is granted.

It well established that a prima facie case for foreclosure and sale is established by the plaintiff's production of the mortgage, the unpaid note and due evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; ***KeyBank Natl. Ass'n v Chapman Steamer Collective, LLC***,117 AD3d 991, 986 NYS2d 598 [2d Dept 2014]; ***Independence Bank v Valentine***, 113 AD3d 62, 64, 976 NYS2d 504 [2d Dept 2014]; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, 964 NYS2d 548 [2d Dept 2013]; ***Solomon v Burden***, 104 AD3d 839, 961 NYS2d 535 [2d Dept 2013]; ***Baron Assoc., LLC v Garcia Group Enters., Inc.***, 96 AD3d 793, 793, 946 NYS2d 611 [2d Dept 2012]). To establish prima facie entitlement to judgment as a matter of law on the issue of liability with respect to a guaranty, a plaintiff must submit proof of the underlying note, a guaranty and the failure of the defendant to make payment in accordance with the terms of those instruments (*see* ***Griffon V, LLC v 11 East 36th, LLC***, 90 AD3d 705, 934 NYS2d 472 [2d Dept 2011]; ***Baron Assoc., LLC v Garcia Group Enter., Inc.***, 96 AD3d 793, *supra*).

These forgoing standards are enlarged where, as here, an answer served includes the defense of standing or lack of capacity to sue. To be entitled to an award of summary judgment against an answering defendant who duly asserts a standing defense in its answer, the plaintiff must establish, prima facie, its standing to prosecute its claims (*see* ***Kondaur Capital Corp. v McCary***, 115 AD3d 649, 981 NYS2d 547 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Rivas***, 95 AD3d 1061, 945 NYS2d 328 [2d Dept 2012]; ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d [2d Dept 2012]; ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]).

The standing of a plaintiff in a mortgage foreclosure action is measured by its ownership, holder status or possession of the note and mortgage at the time of the commencement of the action (*see* ***US Bank of NY v Silverberg***, 86 AD3d 274, 279, 926 NYS2d 532 [2d Dept 2011]; ***Wells Fargo Bank, N.A. v Marchione***, 69 AD3d 204, 887 NYS2d 615 [2d Dept 2009]; ***US Bank, N.A. v Collymore***, 68 AD3d 752, *supra*). Because "a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation" (***US Bank of NY v Silverberg***, 86 AD3d 274, *supra*), a mortgage passes as an incident of the note upon such note's written assignment or physical delivery to an intended transferee (*see* ***Deutsche Bank Natl. Trust Co. v Whalen,*** 107 AD3d 931, 2013 WL 3198184 [2d Dept 2013]; ***US Bank Natl. Ass'n v Cange***, 96 AD3d 825, 947 NYS2d 522 [2d Dept 2012]; ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). A written assignment of the underlying note prior to the commencement of the foreclosure action is sufficient to transfer the obligation and to provide the plaintiff as assignee with standing to prosecute its claims for foreclosure and sale and the mortgage passes with the debt as an inseparable incident (*see* ***Aurora Loan Serv., LLC v Taylor***, 114 AD3d 627, 980 NYS2d 475 [2d Dept

2014], ***Bank of N.Y. v Silverberg***, 86 AD3d 274, *supra*). The plaintiff's production of an "allonge to note" is sufficient to establish that the plaintiff is the transferee of the subject mortgage note by written assignment (*see* ***Deutsche Bank Trust Co. Am. v Codio,*** 94 AD3d 1040, 943 NYS2d 545 [2d Dept 2011]).

Here, the moving papers established, prima facie, the plaintiff's entitlement to summary judgment on its First cause of action against the mortgagor defendants sounding in foreclosure and sale and on its Second cause of action sounding in a deficiency judgment against the note obligor and guarantor defendants, as such papers included copies of the mortgage, the unpaid consolidated note, the guaranties, the Consolidated Mortgage, Consolidation, Modification, Extension and Spreader Agreement and the other loan documents executed on June 29, 2010 together with due evidence of a default under the terms of the note as secured by the mortgage and written guaranties of all obligors (*see* CPLR 3212; RPAPL §1321; ***KeyBank Natl. Ass'n v Chapman Steamer Collective, LLC***,117 AD3d 991, *supra*; ***Emigrant Mtge. Co., Inc. v Beckerman***, 105 AD3d 895, *supra*; ***Solomon v Burden***, 104 AD3d 839, *supra*). The moving papers further established, prima facie, the plaintiff's standing to prosecute its claims for foreclosure and sale and for a deficiency judgment against all obligors, including the guarantors, as such papers demonstrated that the plaintiff is the holder of the mortgage note assigned by an allonge and a written assignment of the mortgage and other loan documents, which allonge and assignment of mortgage were executed by the original lender in favor of the plaintiff on December 14, 2012, pursuant to a purchase agreement between them (*see* ***Deutsche Bank Trust Co. Am. v Codio,*** 94 AD3d 1040, *supra*). The moving papers further established, prima facie, that the affirmative defenses asserted in the answers served, including the plaintiff's purported lack of standing, legal insufficiency, statute of limitations, estoppel and the limited nature of certain of the guaranties are without merit, thus entitling the plaintiff to an award of summary judgment dismissing each of the asserted affirmative defenses (*see* ***Fairmont Capital, LLC v Laniado***, 116 AD3d 998, 985 NYS2d 254 [2d Dept 2014]; ***Mendel Group, Inc. v Prince***, 114 AD3d 732, 980 NYS2d 519 [2d Dept 2014]).

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 their answer or otherwise available to them (*see* ***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]; ***Wells Fargo Bank v Karla,*** 71 AD3d 1006, 896 NYS2d 681 [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]; ***Aames Funding Corp. v Houston,*** 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]). Notably, self-serving and conclusory allegations do not raise issues of fact and do not require plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see* ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movants' papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see* ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also* ***Madeline D'Anthony Enter., Inc. v Sokolowsky***, 101

AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591[2d Dept 2010]).

Summary judgment is awarded to the plaintiff against answering defendants, JBGR s/h/a/ JGBR LLC, InsureNewYork Agency LLC, John Bonlarron and James McGuirk as they failed to oppose this motion by the plaintiff and thus failed to raise any genuine question of fact necessary to defeat the plaintiff's prima facie showing of its entitlement to the relief requested. The affirmative defenses in the answer served by these defendants are thus dismissed and summary judgment in favor of the plaintiff against such defendants is thus granted.

A review of the opposing papers separately submitted by the Hurney defendants, the Elliott defendants and by the Walsh defendants reveals that the same were insufficient to raise any genuine question of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale and insufficient to demonstrate any bona fide defense to the plaintiff's claim for a judgment of foreclosure and sale and to a deficiency to the extent of the guarantors' obligations under the terms of their separate written guaranties of the payment obligations of the note and mortgage obligors (*see* ***Mendel Group, Inc. v Prince***, 114 AD3d 732, *supra*; ***Cochran Inv. Co., Inc. v Jackson***, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]). Rejected as unmeritorious is the standing defense asserted by the answering guarantor defendant Walsh, as such defense was waived by his failure to assert it in his answer or in a pre-answer motion to dismiss (*see* ***JP Morgan Mtge. Acquisition Corp. v Hayles***, 113 AD3d 821, 979 NYS2d 620 [2d Dept 2014]; ***Capital One, N.A. v Knollwood Prop. II, LLC***, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Walsh's attempt to assert this waived defense in opposition to a motion for summary judgment by the foreclosing plaintiff is wholly unavailing (*see* ***Bank of New York Mellon Trust Co. v McCall***, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; ***Capital One, N.A. v Knollwood Prop. II, LLC***, 98 AD3d 707, *supra*; ***JPMorgan Chase Bank, N.A. v Bauer***, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012]; ***US Bank Natl. Ass'n. v Denaro***, 98 AD3d 964, *supra*; ***HSBC Bank, USA v Schwartz***, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]).

Next considered are the standing defenses asserted by guarantor defendants, Hurney and Elliott. These defenses rest upon claims that the absence of any proof of an assignment of their separate, written guaranties by the original lender to the plaintiff precludes an award of summary judgment in favor of the plaintiff on its Second cause of action for a deficiency judgment against them. In support thereof these answering defendants point to the fact that the assignment of mortgage is limited to the mortgage and certain other loan documents and makes no mention of the any of the guaranties. For the reasons stated below, these defense are rejected as unmeritorious.

Personal guaranties are contacts governed by general principles of contract law (*see* NY Pattern Jury Instructions Civil 4:1 [Q]; Restatement [Third] of Suretyship and Guaranty § 7). Unless prohibited by the terms of a contract, contractual rights and remedies, including those in guaranties, are assignable and may be effected by a writing evincing an intent to assign the right in question is (*see* Restatement [Second] of Contracts § 324 [1981] [*providing that assignment of contractual right requires obligee to "manifest an intention to transfer the right to another person*]). Personal

guaranties are, however, secondary obligations and the parties' rights and duties under a guaranty derive from the principal obligation (*see* ***Midland Steel Warehouse Corp. v Godinger Silver Art Ltd.***, 276 AD2d 341, 343, 714 NYS2d 466, 468 [1st Dept 2000] ["*A guarantee is an agreement to pay a debt owed by another that creates a secondary liability and thus is collateral to the contractual obligation.*"]). Because of a guaranty's link to the principal obligation, an obligee's assignment of the principal obligation is sufficient to manifest the requisite intent to assign the guaranty, absent some prohibitory term in the guarantee itself (*see* ***Stillman v Northrup***, 109 NY 473, 17 NE 379 [1888]; ***Craig v Parkis***, 40 NY 181 [1869]; *see also* Restatement [Third] of Suretyship and Guaranty § 13[5]).

Here, as indicated above, the plaintiff's production of the allonge dated December 14, 2012 to the consolidated note sufficiently established the plaintiff's standing as transferee of the subject mortgage note via this written allonge assignment which also effected a transfer the mortgage the security for such debt as an incident thereto (*see* ***Deutsche Bank Trust Co. Am. v Codio,*** 94 AD3d 1040, *supra*). In addition, a separate assignment of mortgage dated December 14 2012, also transferred the mortgage and certain of the other loan documents to the plaintiff. These transfers were sufficient to effect a transfer of the guaranties which are secondary obligations to those of the obligors under the note and mortgage under the above cited case and other authorities. Thus, the failure of the plaintiff to produce a written assignment of the guaranties does not render the standing of the plaintiff questionable nor rebut the plaintiff's prima facie showing of its standing to prosecute its clams for foreclosure and sale and for deficiency judgments against the obligor and guarantor defendants to the extent of their obligations under such guaranties. The standing defense of these guarantor defendants is thus dismissed along with the standing defenses of all their co-answering defendants.

A second defense asserted in opposition to this motion by Hurney, Elliott and Walsh in their guarantor defendant capacities is that the limited nature of the their respective guaranties precludes dismissal of their answer and their mitigation affirmative defense asserted in their answers. However, these claims are without merit since the plaintiff is seeking only to recover deficiency judgments to the extent of each guarantor's obligations under the terms of their written guaranties, which are limited in differing amounts to a percentage of the mortgage debt. Since these are not defenses to liability but instead, relate to the amount of the plaintiff's recovery of a deficiency judgment from these opposing guarantors, they do not warrant a denial of the plaintiff's motion for summary judgment. Dismissal of these defenses to the extent asserted in the answers of Hurney, Elliott and Walsh, are thus granted without prejudice to their rights to reassert them in an effort to compel an adjustment, based on the percetage limits of their respective guaranties, in the amount of any deficiency which the plaintiff may assert in post judgment proceedings of the type contemplated by RPAPL § 1371.

The other affirmative defenses asserted in their answers of those who opposed the instant motion were not asserted in their opposing papers. All such affirmative defenses are thus dismissed, as the defendants failed in their burden of rebutting the plaintiff's prima facie showing of the lack of merit in all such defenses. All other claims asserted in opposition to the plaintiff's motion are rejected as lacking in merit, including the Hurney defendants' challenges to the nature and quantum of proof submitted by the plaintiff in support of its motion.

Those portions of the instant motion wherein the plaintiff seeks summary judgment dismissing the affirmative defenses set forth in the answers served by defendants, JBGR s/h/a/ JGBR LLC, InsureNewYork Agency LLC, John Bonlarron and James McGuirk; Paul Elliott, Elliott WR Golf LLC, Great Rock Golf 2006 LLC and Wading River Catering LLC; Walter T. Hurney and Hurney WR Golf LLC; and by Mark J. Walsh and Walsh WR Golf LLC are granted as are those portions wherein the plaintiff seeks summary judgment on its complaint against these answering defendants.

Also granted are the those portions of the plaintiff's motion wherein it seeks, in effect, the fixation of defaults in answering by the remaining defendants including Blackwell's Restaurant and Great Rock Golf Club who were served as John Doe numbered 1 and 2, failed to appear herein by answer or otherwise. The defaults of these defendants are hereby fixed and determined. Since the plaintiff has been awarded summary judgment against the answering defendants and has established a default in answering by the remaining defendants, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*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]; ***LaSalle Bank, NA v Pace,*** 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct. Suffolk County 2011], *aff'd,* 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]). Those portions of the plaintiff's motion wherein it seeks an order of reference are thus granted.

All incidental relief requested by the plaintiff is also granted. Blackwell's Restaurant and Great Rock Golf Club are hereby substituted as party defendants for John Doe #1 and John Doe #2, respectively. The remaining unknown defendants are dropped as party defendants to this action. Amendment of the papers previously served and filed herein and the caption of this action to cure a misnomer in the name of the first listed defendant to be JBGR LLC rather than JGBR LLC is hereby granted. The caption is amended to reflect all of these party changes, deletions and misnomers and all future proceedings shall be captioned accordingly.

Proposed Order of Reference, as modified by the court, signed upon issuance of this order.

Dated: July 21, 2014

THOMAS F. WHELAN, J.S.C.