At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of September, 2015.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

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COLFIN FCSB FUNDING A, LLC,

Plaintiff,

- against -

Index No. 502307/2014

LMM GROUP II LLC, ISAAC DEUTSCH, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, AND "JOHN DOE #1 THROUGH "JOHN DOE #10," THE LAST TEN 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 OR LIEN UPON THE PREMISES DESCRIBED IN THE COMPLAINT,

Defendants.

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The following e-filed papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	31-43
Opposing Affidavits (Affirmations)	45-59
Reply Affidavits (Affirmations)	64-66
Affidavit (Affirmation)	
Defendants' Memorandum of Law	60

In this commercial mortgage foreclosure action by plaintiff Colfin FCSB Funding A, LLC (plaintiff) against defendants LMM Group II LLC (LMM), Isaac Deutsch (Deutsch),

New York City Environmental Control Board, New York City Transit Adjudication Bureau, and "John Doe #1" through "John Doe #10," plaintiff moves, under motion sequence number one, for an order: (1) pursuant to CPLR 3212 (b), granting it summary judgment against defendants LMM and Deutsch (collectively, defendants), (2) pursuant to CPLR 3215, granting it a default judgment against the non-answering defendants New York City Environmental Control Board and New York City Transit Adjudication Bureau, (3) directing that the fictitious defendants, designated as "John Doe #1" through "John Doe #10," be deleted from the caption, and (4) appointing a Referee pursuant to RPAPL 1321 and/or CPLR 4311, to compute the amounts due.

BACKGROUND

On December 23, 2008, LMM, as borrower, in order to evidence its indebtedness in the amount of $5,300,000 (the loan) to First Central Savings Bank (First Central), as lender, executed, acknowledged, and delivered to First Central a Restated Mortgage Promissory Note (the note). Also on December 23, 2008, as collateral security for the payment of the indebtedness evidenced by the note, LMM, as mortgagor, executed and delivered to First Central, as mortgagee, an Assumption, Modification & Extension Agreement (the mortgage), granting First Central a mortgage on real property located at 1362 49th Street, in Brooklyn, New York (the property). On the same date, as further collateral security for the indebtedness evidenced by the note, LMM executed and delivered to First Central an Assignment of Rents and Leases. In addition, on the same date, Deutsch, who is the

managing member of LMM, as guarantor, duly executed, acknowledged, and delivered to First Central a Guaranty of Payment (the guaranty), in which he guaranteed the payment of the debt evidenced by the note and secured by the mortgage. On March 25, 2009, the mortgage was duly recorded in the Kings County Clerk's Office. On January 30, 2012, First Central assigned the loan and related loan documents to plaintiff by an agreement dated as of January 30, 2012 and an assignment of mortgage dated February 13, 2012, and by physical delivery of the loan documents.

The note provided that LMM promised to pay the principal sum of $5,300,000 on the maturity date of January 1, 2019, with interest thereon, calculated at certain specified rates for designated time periods. Paragraph 2 of the note stated that "[o]n December 23, 2013, if all of the outstanding principal, interest and other amounts due hereunder have not been paid in full, a continuation fee of one half (0.50%) of one percent of the principal balance then outstanding will be due and payable."

Section 4 (p) of the mortgage provides that an "Event of Default" under the mortgage arises if LMM "fails to pay on December 23, 2013 a continuation fee of one half (0.50%) of one percent of the principal balance then outstanding, if all of the outstanding principal, interest and other amounts due hereunder have not been paid in full by December 23, 2013."

Section 5 (a) (i) of the mortgage provides, in pertinent part, that "[u]pon the occurrence of an Event of Default . . . [t]he entire Indebtedness will, at the option of the Mortgagee in its sole and absolute arbitrary discretion, become immediately due and

payable." The note, at page 2, similarly provides that "[t]he entire indebtedness (principal and interest) evidenced by this Note shall become immediately due and payable upon the failure to make any payment due hereunder after the applicable notice or grace period specified therein, if any, or upon the occurrence of any other Event of Default under the Mortgage, Assignment of Rents and Leases and/or the Other Security Documents."

The note, at page one, further provides that "[i]f the entire principal sum hereunder is not paid when due, whether on the Maturity Date or earlier by reason of acceleration of the payment hereof, then from and after such due date, interest shall accrue on the unpaid principal sum at twenty-four percent per annum but not more than the highest legal rate." The note, at page 2, states that in the event that there is an action commenced to foreclose, LMM agrees to pay "in addition to the principal, any late payment charge and interest due and payable hereunder, all costs of collecting or attempting to collect such indebtedness, including reasonable attorneys' fees and expenses."

The note, at page two, also states that "[a]ll parties hereto, whether Maker, principal, surety, guarantor or endorser, hereby waive demand, notice of demand, protest and notice of protest." Section 5 (a) (ii) of the mortgage expressly provides that "[u]pon the occurrence of any Event of Default . . . [t]he Mortgagee, in its sole and absolute discretion may institute foreclosure or other proceedings or other actions as may be provided for herein or permitted by law . . ."

Under the terms of the guaranty, Deutsch agreed to irrevocably, absolutely, and unconditionally guarantee the prompt and unconditional payment of the amounts due under the loan and the due and prompt performance by LMM of all of its obligations under the loan documents. The guaranty also provided that Deutsch waived "presentment and demand for payment of the Debt or any portion thereof," "protest and notice of dishonor or default . . . with respect to the debt or any portion thereof," and "any demand for payment under this guaranty."

Plaintiff alleges that defendants defaulted on their obligations in connection with the loan by LMM's violation of section 4 (p) of the mortgage. Specifically, plaintiff asserts that despite the fact that the outstanding principal, interest, and other amounts due under the mortgage were not paid in full by December 23, 2013, LMM failed and/or refused to pay the continuation fee on or before December 23, 2013 or thereafter, as required by the mortgage.

By a notice of default, dated January 14, 2014, sent by certified mail/return receipt requested to defendants, plaintiff provided defendants with written notice that they were in default as a result of, among other things, the failure to pay the continuation fee as required by section 4 (p) of the mortgage. This letter advised defendants that unless this default, along with other stated defaults, were cured within 30 days of the giving of this notice, an event of default would exist under the note and mortgage.

Defendants claim that LMM had inadvertently neglected to pay the continuation fee because its agreement to pay it was set forth in the mortgage, which it had executed on

December 23, 2008, five years before this continuation fee was due on December 23, 2013, and that it, therefore, did not recall that it was due until plaintiff sent the notice of default. Deutsch contacted Jay Kimmel, Esq., an attorney, who, on February 13, 2014, e-mailed plaintiff's attorney, Jeffrey A. Miller, Esq.

In this February 13, 2014 e-mail, Mr. Kimmel stated that Deutsch "[wa]s aware that the half point is due after five years," but that "most lenders would normally send an invoice well in advance of the due date and remind borrowers of monies that are due by means other than a default notice." He requested that plaintiff "prepare and send an invoice spelling out the amount that [wa]s due," and advised Mr. Miller that the continuation fee would then "be paid in due course."

Mr. Miller responded to Mr. Kimmel's February 13, 2014 e-mail by a February 24, 2014 e-mail and letter sent by certified mail, in which he, among other things, stated that the continuation fee had not been paid to plaintiff, "in a timely fashion or otherwise," and that there was "no requirement in the Mortgage or otherwise that the mortgagee must send an 'invoice' detailing the amounts owed or any other notice." This February 24, 2014 letter, which was designated as an acceleration notice, advised Mr. Kimmel that plaintiff was thereby electing to accelerate and declare the entire amount due under the loan documents in the principal sum, as of February 18, 2014, of $5,025,965.42, together with any applicable unpaid interest, penalties, and fees, immediately due and payable, and demanded that defendants immediately pay the indebtedness. Plaintiff alleges that, as set forth in this

acceleration notice, as a result of this acceleration, the total amount of principal due and owing to it as of June 3, 2014, is $5,025,965.42. Annexed to plaintiff's moving papers is a payoff quote issued June 5, 2014, showing an amount due of $5,532,092.04, inclusive of interest to June 3, 2014.

On March 17, 2014, plaintiff filed this action seeking to foreclose the mortgage, together with a notice of pendency. On June 6, 2014, defendants interposed an answer to plaintiff's complaint, asserting 10 affirmative defenses. The New York City Environmental Control Board and the New York City Transit Adjudication Bureau have failed to appear and/or answer the complaint and their time to do so has expired. Plaintiff asserts that it has now determined that "John Doe #1" through "John Doe #10" are not necessary party defendants.

On August 19, 2014, plaintiff filed its instant motion, returnable September 9, 2014. Defendants opposed plaintiff's motion by affidavit of defendant Deutsch dated October 22, 2014. Following oral argument on May 6, 2015, further negotiations regarding reinstatement of the loan took place. The court was notified of the failure of these negotiations on June 2, 2015, and plaintiff's motion must now be determined.

DISCUSSION

In support of their motion, plaintiff has submitted copies of all of the loan documents and an affidavit by Ryan Riemer (Riemer), as its authorized representative, attesting to defendants' default. Plaintiff asserts that defendants' failure to pay the continuation fee is

undisputed, and that since this constitutes an event of default pursuant to section 4 (p) of the mortgage, it is entitled to summary judgment.

Defendants, in opposition to plaintiff's motion, contend the plaintiff's attempt to accelerate the loan and foreclose on the mortgage is unconscionable. They argue that plaintiff deliberately failed to bill LMM for the continuation fee. In support of this argument, they assert that plaintiff, by its loan servicing agent, Midland Loan Services (Midland), agreed to invoice LMM for all amounts due in a letter sent by to LMM by Midland dated May 7, 2012 (the "Hello Letter"). They state that Midland regularly sent invoices for all other amounts due in connection with the mortgage, but did not send it an invoice for the continuation fee.

While Midland's "Hello Letter" is binding on plaintiff as Midland was acting as its agent, the failure to invoice LMM for the continuation fee was not a breach of plaintiff's obligations. The loan documents did not state that any notice would be sent to LMM regarding the payment of the continuation fee, and the "Hello Letter" could not amend or modify the loan documents. Moreover, the "Hello Letter" simply stated "[a] billing statement with current balance and payment information will be sent to you approximately two weeks prior to your payment due date." The billing statements that were sent to LMM only billed for monthly principal, interest, and escrow payments. In any event, once defendants received the notice of default, they could no longer rely upon the "Hello Letter" or reasonably believe

that the billing statement sent prior to the December 23, 2013 due date of the continuation fee included that fee.

Defendants' claimed lack of knowledge that the continuation fee was due is belied by Mr. Kimmel's statement, in his February 13, 2014 e-mail, that Deutsch was "aware that the half point is due after five years." While Mr. Kimmel stated that "most lenders would normally send an invoice" for monies that are due, he did not point to any requirement in the loan documents that an invoice be sent for the continuation fee when he first demanded this invoice, in his February 13, 2014 e-mail, first sent to Mr. Miller 30 days after the January 14, 2014 notice of default. Indeed, as previously noted, there is no such requirement set forth in the note, mortgage, or any of the other loan documents that the mortgagee send an invoice for the continuation fee.

Defendants contend that plaintiff wrongfully refused LMM's request for an invoice setting forth the precise amount of the continuation fee because, despite the fact that the notice of default demanded that they pay the continuation fee within 30 days to avoid acceleration of the loan, this notice did not state the precise amount of this fee. There was no provision, however, in the loan documents requiring plaintiff to provide LMM with the amount of the continuation fee that was due and owing in order to trigger its obligation to pay. Defendants' claim that they were not aware of the amount of this fee and, therefore, could not pay it because plaintiff did not respond to their request, made 30 days after the notice of default, for an invoice setting forth the amount of this fee, is disingenuous.

Defendants acknowledge that the loan documents set forth a formula to calculate the amount of the continuation fee. This formula is "one half (0.50%) of one percent of the principal balance then outstanding" as of December 23, 2013 in the event that "all of the outstanding principal, interest and other amounts due hereunder have not been paid in full by December 23, 2013." Defendants were aware that these sums were not paid in full and they were in possession of the December 2013 monthly mortgage statement (which is annexed to their opposition papers), showing that as of December 17, 2013, the "current principal balance" of the loan was $5,036,117.56. Thus, defendants could simply have calculated that one-half of one percent of $5,036,117.56 equaled $25,180.59, which was the amount of the continuation fee due, as also set forth in the subsequent payoff letter dated June 5, 2014. Notably, defendants made no attempt to tender any part of this continuation fee.

Defendants also contend that plaintiff's acceleration of the loan is unconscionable because it already is holding $25,000 of LMM's money in escrow. It asserts that these escrow funds should have been applied, in whole or in part, to offset the continuation fee without any acceleration of the balance of the loan. The purpose for such deposited escrow funds is to serve as security in order to guarantee the availability of a fund from which taxes and other charges can be paid when they become due, so as to protect mortgagee against the lien of any such taxes or charges, rather than to serve as a fund to be applied toward a defaulted payment (*see generally Eightway Corp. v Dime Sav. Bank of Williamsburgh*, 94 Misc 2d 274, 277-278 [Civil Ct, Queens County 1978], *affd* 99 Misc 2d 989 [App Term

1979]). As to the application of payments, the note states that "[a]ll payments shall be applied first to any fees due hereunder, then interest and then to principal." The note further states that "after an Event of Default under the Mortgage, without notice" the mortgagee has the "sole discretion" as it "may elect" to apply any deposits it may hold on account of the Borrower to principal, interest or "other charges due hereunder."

Significantly, the mortgage statement as of December 17, 2013, under the heading "Past Due Payment Information" stated that LMM owed "Past Due Interest" in the amount of $31,475.73, "Past Due Escrow" in the amount of $8,610.13, and "Past Due Late Charges" in the amount of $73,855.67. Similarly, the mortgage statement as of January 17, 2014 (which was the first mortgage statement postdating the default, but prior to the notice of acceleration), under the heading "Past Due Payment Information" stated that LMM owed "Past Due Interest" in the amount of $32,488.87, "Past Due Escrow" in the amount of $8,610.13, and "Past Due Late Charges" in the amount of $75,708.59. Thus, at the time of, and immediately following, LMM's default, plaintiff's records indicated LMM's past due obligations owing under the loan documents far exceeded the $25,000 that plaintiff was holding in escrow. The loan documents did not obligate plaintiff to disregard these past due charges owing to it by LMM in order to apply the funds being held in escrow to satisfy LMM's obligation to pay the continuation fee.

While defendants now argue that equity should prevent foreclosure in these circumstances based upon a defense of unconscionable conduct by plaintiff, defendants,

while raising 10 affirmative defenses in their answer, failed to raise the affirmative defense of unconscionability therein (*see* CPLR 3018 [b]). An affirmative defense which has not been pleaded is waived (*see Jordan v Villetto*, 38 AD3d 716, 717 [2d Dept 2007]; *Apex Two v Terwilliger*, 211 AD2d 856, 858 [3d Dept 1995]).

In any event, the mere insistence upon contractual rights under a mortgage is not regarded as unconscionable and oppressive (*see Graf v Hope Bldg. Corp.*, 254 NY 1, 4 [1930]). "'The law is clear that when a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene'" (*Home Sav. of Am. v Isaacson*, 240 AD2d 633, 633 [2d Dept 1997], quoting *New York Guardian Mortgagee Corp. v Olexa*, 176 AD2d 399, 401 [3d Dept 1991]).

The Court recognizes that there is authority holding that "a motion for summary judgment should be denied where the mortgagor asserts a valid defense, including tender of the entire amount then due, bad faith on the part of the mortgagee or an unconscionable act" (*New York Guardian Mortgagee Corp.*, 176 AD2d at 401; *see also Di Matteo v North Tonawanda Auto Wash*, 101 AD2d 692, 693 [4th Dept 1984], *appeal dismissed* 63 NY2d 675 [1984]; *Fairmont Assoc. v Fairmont Estates*, 99 AD2d 895, 896 [3d Dept 1984], *appeal denied* 62 NY2d 602 [1984]; *100 Eighth Ave. Corp. v Morgenstern*, 4 AD2d 754, 754 [2d Dept 1957]). While the defense of unconscionability has, in certain cases, provided a basis for the denial of summary judgment, the cases accepting this defense are fact specific and

involve circumstances where the conduct by the mortgagee is particularly egregious and the default is inadvertent or trivial. That is not the case here where the defendants never tendered the amount due though accorded thirty days to cure their default in the Notice of Default dated January 14, 2014. Defendant's response was to demand an invoice on February 13, 2014.

In *Grand Pac. Fin. Corp. v 97-111 Hale, LLC* (123 AD3d 764, 766 [2d Dept 2014]), a recent case addressing the defense of unconscionability, the Appellate Division, Second Department, found that the defendants therein had raised a triable issue of fact as to whether the plaintiff had acted in bad faith and engaged in oppressive and unconscionable conduct in, among other things, allegedly preventing certain of the respondents from paying off the loan secured by the subject mortgage unless they also paid off certain loans made by additional cross-claim defendants and by interfering with their attempts to obtain funds from, or sell the subject properties to, other investors. There is no unconscionable conduct by plaintiff of this nature in the present case.

Defendants, in contending that plaintiff's conduct was unconscionable, heavily rely upon *Domus Realty Corp. v 3440 Realty Co., Inc.* (179 Misc 749, 754-755 [Sup Ct, NY County 1943], *affd* 266 App Div 725 [1st Dept 1943]), which defined "oppressive" conduct as meaning "conduct that is unjustly burdensome, harsh or merciless," and 'unconscionable' conduct as meaning "conduct that is monstrously harsh, [and] that is shocking to the conscience." Such reliance is misplaced since the mere failure by plaintiff to provide LMM

with an invoice stating the amount of the continuation fee, while Deutsch was already aware of the existence of the continuation fee and defendants could have themselves calculated this fee, based upon the notice of outstanding principal contained in the statement from plaintiff's servicer effective December 17, 2013, just six days before the due date for the continuation fee, and paid it following their receipt of the notice of default and prior to the notice of acceleration, does not meet these definitions.

Notably, in *Domas Realty Corp.* (179 Misc at 754), the Supreme Court, New York County, in denying summary judgment in a mortgage foreclosure action based upon the mortgagor's defense of unconscionable conduct by the plaintiff-mortgagee, observed that conduct is unconscionable and/or oppressive in situations where a default is inadvertent, there is only a slight delay in making the payment, the mortgagee is not prejudiced, and accelerating the loan for such a "trivial default is entirely out of proportion to the harshness of the plaintiff's action in declaring the entire amount of the principal due under the acceleration clause, and depriving the defendant of the benefit of [the] mortgage." Here, defendants never attempted to pay the continuation fee, and it cannot be said that defendants' default was inadvertent or trivial.

Defendants also rely upon *Fairmont Assoc. v Fairmont Estates* (99 AD2d 895, 895-896 [3d Dept 1984], *appeal denied* 62 NY2d 602 [1984]), which held that "the equitable remedy of foreclosure may be denied in the case of an inadvertent, inconsequential default in order to prevent unconscionably overreaching conduct by a mortgagee." The Appellate

Division, Third Department, in *Fairmont Assoc.* (99 AD2d at 896), found that the default by the plaintiff-mortgagor "was occasioned by an inadvertent clerical error on the part of either [the] plaintiff[-mortgagor] or its bank; that [the] plaintiff[-mortgagor had] tendered full payment of the installment due immediately upon discovery of the problem; that the actual period of delay was relatively brief; that acceleration of the debt would work a substantial hardship; and that [the] defendants offered no true opportunity for [the] plaintiff[-mortgagor] to remedy the inadvertent error and were all too anxious to exercise their acceleration rights." The facts of *Fairmont Assoc.* are inapposite to the facts of the present action.

Recently, the Supreme Court, Queens County, in the case of *BNH Caleb 14 LLC v Mabry* (2015 NY Slip Op 25212 [Sup Ct, Queens County Jun 25, 2015]), addressed the defense of unconscionability in a mortgage foreclosure action where the plaintiff BNH Caleb 14 LLC (BNH), who was the assignee of a mortgagee, moved for summary judgment in an action to foreclose on a mortgagor's mixed use property as a result of a late monthly payment. However, the facts in *BNH Caleb* are readily distinguishable from those of the present case. In that case, the mortgage payments were due on the first day of the month and the defendant-mortgagor's check, which was dated April 8, 2014 for the April 1, 2014 payment and made to the order of BNH's counsel, was not allegedly received until April 14, 2014. Although the mortgage note only permitted a 10-day grace period, it was nevertheless accepted and endorsed by BNH's counsel, deposited and cashed. The defendant-mortgagor's payment did not include a monthly late fee of 5% of $2,363.42 or approximately $118.15.

The defendant-mortgagor's May 2014 payment was also late, and BNH, by its counsel, sent a letter to the defendant-mortgagor, deeming her in default under the mortgage note and accelerating all other payments for her alleged lateness coupled with her failure to include the $118.15 late fee in the prior month's payment. The Supreme Court, Queens County, found that the mortgagor had set forth a meritorious defense based upon the unconscionability of BNH because its attorney had accepted the defendant-mortgagor's first late check, which did not include the required late fee, and caused it to be deposited, instead of declaring a default, thereby lulling her "into a sense of belief that her tardy payment would be accepted, albeit with the imposition of additional late fees." The Supreme Court, Queens County, therefore, held that genuine issues of material fact existed as to whether it was unconscionable for BNH to foreclose the mortgage on the defendant-mortgagor's real property following the second late monthly mortgage payment after her first late check had been accepted and cashed by BNH's attorney, precluding summary judgment in favor of BNH.

Here, in contrast, defendants were never lulled into a sense of security by plaintiff. Rather, the January 14, 2014 notice of default specifically warned defendants that the failure to pay the continuation fee within 30 days would result in an event of default. As noted above, defendants never attempted to tender payment of the continuation fee and did not even respond to this notice of default until February 13, 2014.

Thus, the court does not find that defendants have raised a triable issue of fact with respect to a defense of unconscionability. Defendants point to a prior attempt by plaintiff to

declare LMM in default, however, plaintiff did not bring a foreclosure action based on that alleged default and that issue was resolved, rendering it irrelevant to the instant motion. While plaintiff has cited to other alleged acts of default by defendants in its complaint, which defendants deny, these allegations are also irrelevant to this motion since plaintiff has elected to seek summary judgment in this motion based solely upon LMM's default in paying the continuation fee.

Defendants also rely upon their pleaded affirmative defense of unclean hands, citing *Golden Eagle Capital Corp. v Paramount Management Corp.* (88 AD3d 646 [2d Dept 2011]), contending that it was plaintiff's conduct which caused LMM's default. In *Golden Eagle*, the defense of unclean hands was premised on plaintiff's alleged concealment of material facts, a circumstance not present here. The basis for defendants' claims appears to be plaintiff's purpose to acquire the property through foreclosure as part of its business strategy. Such purpose is neither inequitable nor illegal (*see Home Savings of America FSB v Isaacson*, 240 AD2d 633). Defendants further cite to three other actions commenced by plaintiff and an affiliate of plaintiff, in which they have sought to foreclose mortgages. They argue that the commencement of these foreclosure actions evidence an "oppressive investment strategy" by plaintiff. Plaintiff's exercise of its right to foreclose in these unrelated actions, however, does not render its conduct improper in this action. The alleged defense of unclean hands is insufficient to raise a triable issue of fact for the reasons discussed above.

Defendants additionally cite to *Moet II v McCarthy* (229 AD2d 876, 877 [3d Dept 1996]), which held that a notice of default was defective where it did not comply with the requirements of the mortgage therein that such notice must, among other things, state the promise or agreement that the mortgagor failed to keep and the action that the mortgagor must take to correct that default. They contend that plaintiff's notice of default was defective because it did not set forth the amount of the continuation fee or sufficiently inform LMM how it could cure this alleged default. This contention is devoid of merit. The formula to calculate the continuation fee was set forth in the note and the mortgage, and there was no requirement in the mortgage that the notice of default state this amount. Furthermore, since payment of the continuation fee within 30 days would necessarily cure the default claimed, the notice of default duly afforded LMM an opportunity to cure their default. Moreover, the mortgage did not specifically provide that plaintiff was required to issue a default notice, and, thus, it did not mandate that any particular terms be set forth in the notice of default (*see Indymac Bank, F.S.B. v Kamen*, 68 AD3d 931, 931 [2d Dept 2009]).

Defendants further argue that the affidavit of Riemer, submitted in support of plaintiff's motion, which attests to LMM's default, is insufficient to provide a basis for summary judgment because he has identified himself only as an "authorized representative" of plaintiff without evidence demonstrating his authority to accelerate the loan and commence this action. Plaintiff, in reply, has annexed the affidavit of Ronald M. Sanders, who is a vice-president of ColonyGP Credit II, LLC. ColonyGP Credit II, LLC is the general

partner of ColonyGP Credit II, L.P., which is the general partner of Colony Distressed Credit Fund II. L.P., which is the sole member of plaintiff. Plaintiff has also annexed a copy of a Written Consent of the Member of ColFin FCSB Funding A, LLC, dated October 24, 2012 (the Consent).

The Consent authorizes, empowers, and directs, among others, "the individual person holding the title of 'Portfolio Manager' . . . in the name and on behalf of [plaintiff], to approve, execute and deliver, from time to time, all documents, contracts and agreements relating to the management and servicing of" loans acquired by plaintiff. Section C of the Consent addresses the powers of the Portfolio Manager with respect to foreclosure proceedings, and provides that the Portfolio Manager, as an authorized signatory, is "authorized, empowered, and directed, in the name and on behalf of [plaintiff], to approve, execute and deliver, from time to time, documents to implement such Foreclosure Proceedings, including, without limitation, complaints, affidavits, [and] documents." Mr. Sanders' affidavit sets forth, in detail, that Riemer is a Portfolio Manager of plaintiff and an authorized signatory, as that term is defined in the Consent. He states that, as such, Riemer has full and sufficient authority to accelerate the loan, to verify the complaint in this action, and to otherwise act on behalf of plaintiff in connection with the loan in this action, as well as in connection with the submission of affidavits on behalf of plaintiff in this action. Plaintiff, by the submission of the Consent and Mr. Sanders' affidavit, has adequately established Riemer's authority to accelerate the loan and commence this action.

Plaintiff, in its supporting papers, has further demonstrated that defendants' remaining affirmative defenses, as interposed in their answer, are without merit. In opposition, defendants have failed to specifically address plaintiff's arguments regarding these other affirmative defenses and do not attempt to raise any triable issue of fact with respect to any of them. It is specifically noted that defendants expressly waived the defense of lack of jurisdiction in their stipulations extending their time to answer.

Thus, inasmuch as plaintiff has established its prima facie entitlement to judgment as a matter of law in this foreclosure action by producing the mortgage, the unpaid note, the guaranty, and Riemer's affidavit attesting to defendants' default in payment, and, in opposition, defendants have failed to submit any evidence sufficient to raise a triable issue of fact as to a bona fide defense, plaintiff is entitled to summary judgment in its favor (*see Wells Fargo Bank, N.A. v DeSouza*, 126 AD3d 965, 965 [2d Dept 2015]; *One W. Bank, FSB v DiPilato*, 124 AD3d 735, 735 [2d Dept 2015]; *Peak Fin. Partners, Inc. v Brook*, 119 AD3d 539, 539 [2d Dept 2014]; *Sperry Assoc. Fed. Credit Union v Alexander*, 116 AD3d 759, 759 [2d Dept 2014]; *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895-896 [2d Dept 2013]; *Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793, 793 [2d Dept 2012]). In addition, plaintiff is entitled to an order of reference (*see* RPAPL 1321; *Citimortgage, Inc. v Chow Ming Tung*, 126 AD3d 841, 843 [2d Dept 2015]; *Deutsche Bank Natl. Trust Co. v Islar*, 122 AD3d 566, 568 [2d Dept 2014]).

Insofar as plaintiff, by its motion, seeks a default judgment against the non-answering defendants, i.e., New York City Environmental Control Board and New York City Transit Adjudication Bureau, plaintiff, by submitting proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of these defendants' failure to answer or appear, has demonstrated its prima facie entitlement to a default judgment against them (*see* CPLR 3215 [f]; *Citimortgage, Inc.*, 126 AD3d at 843; *U.S. Bank, N.A. v Razon*, 115 AD3d 739, 740 [2d Dept 2014]; *Mortgage Elec. Registration Sys., Inc. v Smith*, 111 AD3d 804, 806 [2d Dept 2013]; *Loaiza v Guzman*, 111 AD3d 608, 609 [2d Dept 2013]). Thus, the granting of this branch of plaintiff's motion, which is unopposed, is warranted.

Additionally, plaintiff's motion must be granted insofar as it seeks to delete the names of "John Doe #1" through "John Doe #10" from the caption of this action on the basis that they are unnecessary parties since there are no "John Does" occupying the property (*see Flagstar Bank v Bellafiore*, 94 AD3d 1044, 1046 [2d Dept 2012]; *Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 874 [2d Dept 2009]).

CONCLUSION

Accordingly, plaintiff's motion for summary judgment in its favor based upon defendants' default in the payment of the continuation fee is granted. This case will be referred to a referee, who shall be appointed to ascertain and compute the sum due to plaintiff unless the parties stipulate thereto. Since plaintiff has already submitted a proposed order for the appointment of a referee in this mortgage foreclosure action, such order (which is

annexed as exhibit 1 to its motion, document #34) will be signed by the court, and a referee will be selected from the list established by the Chief Administrator of the Courts pursuant to the Rules of the Chief Judge (22 NYCRR) Part 36. The caption of this action is amended to delete the names of "John Doe #1 through "John Doe #10" as defendants. A default judgment shall be entered with the Kings County Clerk as against New York City Environmental Control Board and New York City Transit Adjudication Bureau, which have not answered or appeared in this action.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. CAROLYN E. DEMAREST