At an IAS Term, Part Comm-9 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 7th day of April, 2017.

PRESENT:

HON. DAVID B. VAUGHAN,
Justice.

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MOHINI MITTAL

Plaintiff,

-against-

EASTERN PARKWAY SERVICE, INC., BRINDER PAL SINGH, AND JOHN AND JANE DOE(S) 1-10, the names of the last ten defendants being fictitious and unknown to plaintiff, plaintiff intending to designate persons or parties having or claiming to have an interest in or lien upon the described premises,

Defendants.

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DECISION, ORDER and JUDGMENT

Index No. 508173/14

The following papers numbered 1 to 6 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1,2 and exhibits
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	5,6
Other Papers	

002 - XMG/SOD
003 - XMD

Upon the foregoing papers, plaintiff MOHINI MITTAL moves pursuant to CPLR §3212 for summary judgment on her claims and, pursuant to CPLR Article 64, RPL §254[10] and RPAPL §1325, for the appointment of a receiver to collect the rents and profits derived from the property that is the subject of this commercial foreclosure action. Defendants EASTERN PARKWAY SERVICE, INC. and BRINDER PAL SINGH cross move to cancel the Note and Mortgage upon the subject property, which are the basis for plaintiff's claim; and, pursuant to CPLR § 3211[1] and CPLR § 3211[7], to dismiss plaintiff's complaint for failure to state a cause of action.

Plaintiff's motion is granted and defendants' cross motion is denied.

Plaintiff MOHINI MITTAL is the holder of a Note and Mortgage against the property known as, and located at, 1412 Eastern Parkway in the County of Kings, within the state of New York (hereafter, "the Property"), which is owned by defendant EASTERN PARKWAY SERVICE, INC. (hereafter "EPS"), a domestic corporation. The Note and Mortgage were given to plaintiff by defendant EPS as Mortgagor and executed by defendant BRINDER PAL SINGH, who is the sole officer and sole shareholder of EPS, to secure various debts owed to plaintiff by defendant SINGH or by entities that he controlled. The Mortgage was recorded in the Office of the City Register of New York and indexed against the Property on December 9, 2008 (CRFN 2008000469106). The Property is improved by a gas station which was at certain times leased to a commercial tenant or tenants.

Plaintiff MITTAL and defendant SINGH are former business partners who, prior to October 1, 2008, each owned one hundred (100) shares of the outstanding two hundred (200) shares of EPS stock, giving each a fifty percent (50%) stake in the corporation. Plaintiff alleges, and defendants admit, that the Note and Mortgage, in the amount of $210,000, combined two debts into a single obligation. The first debt, in the amount of $60,000, plaintiff loaned to defendant SINGH on

November 7, 2006 (*see* Pl. Ex. "D," Promissory Note, Nov. 7, 2006). By its terms, the loan was to be repaid by defendant SINGH from the proceeds of any sale or lease of the subject property. The second debt, in the amount of $150,000, was the purchase price reached by plaintiff and defendant SINGH in a separate agreement dated October 1, 2008, whereupon plaintiff sold and transferred all one hundred (100) shares of her stock in the corporation to defendant SINGH (*see* Pl. Ex. "B," Agreement, Oct. 1, 2008).

According to the terms of the Mortgage Note, defendant EPS would make no payments and incur no interest on the $210,000 principal until August 1, 2010, at which time the entire principal balance would become due and payable as a single balloon payment. The terms further provided that if payment was not made in full by August 1, 2010, interest would be charged at a rate of sixteen percent (16%) from the date of the Note. Plaintiff alleges that no payment was made on the due date. Nevertheless, the parties entered into a forbearance agreement on April 19, 2013. By the terms of that agreement, defendant SINGH would pay $10,000 and execute a personal guaranty for payment of the $210,000 obligation, in exchange for the due date of the entire balance being extended to October 14, 2013 (*see* Pl. Ex. "G," Forbearance Agreement, Apr. 19, 2013).

Plaintiff alleges that defendant Singh remitted the $10,000 but thereafter failed to make any payments at all on the outstanding debt. Plaintiff commenced the instant action by the service of a Summons and Complaint on September 5, 2014 and the filing of a Notice of Pendency on September 17, 2014. An Amended Summons and Complaint was served on October 16, 2014 and a Supplemental Summons and Second Amended Complaint was served, by leave of the court, on March 4, 2016.

Defendants EPS and SINGH assert eight affirmative defenses: (1) that service of the summons and complaint was defective because it was effectuated upon a tenant at the subject property and upon a neighbor of defendant SINGH; (2) that the November 7, 2006 promissory note is invalid since it does not specify a due date for the obligation; (3) that the $60,000 loan under the November 7, 2006 promissory note was only due and owing upon the happening of a condition precedent which never happened; (4) that the $60,000 loan under the November 7, 2006 promissory note was subsumed by and made a part of the $210,000 promised under the Note of October 1, 2008; (5) that the guaranty executed by defendant SINGH is ineffective to bind him personally because the $210,000 obligation belongs to defendant EPS and because the corporation name listed is incorrect; (6) that no $210,000 loan was ever made from plaintiff MITTAL to EPS and that the October 1, 2008 Note is thus fraudulent and void; (7) that plaintiff MITTAL still owned 50% of EPS at the time the October 1, 2008 agreement was signed, creating an obligation of EPS to herself, and that the obligation is thus illusory and void; and (8) that the valuation for the transfer of shares from plaintiff to defendant SINGH was based on mutual mistake. They also assert two counterclaims, seeking a declaratory judgment and reformation of the October 1, 2008 Note based on their sixth and eighth affirmative defenses, respectively.

Defendants EPS and SINGH filed their cross motion on November 10, 2014. In opposition to plaintiff's motion for summary judgment and in support of their cross motion to cancel the Note and Mortgage and dismiss the Complaint, defendants argue, *inter alia*, (1) that the October 1, 2008 Note and Mortgage are legally void as a matter of law because they purport, at least in part, to encumber one corporation with the debts of another, unrelated corporation; (2) that the affirmation of plaintiff MITTAL in support of her motion is inadmissible because she lacks personal knowledge

of the circumstances of the purported loans; and (3) that the appointment of a receiver for the property is not necessary, as failure to pay a debt secured by property does not create a danger that said property will be materially injured or destroyed, as outlined in CPLR § 6401[a]. Defendants also repeat and reassert their fifth and eighth affirmative defenses in support of their cross motion.

Standard for Summary Judgment

A party is entitled to summary judgment "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR § 3212[b]). To prevail on a motion for summary judgment, the moving party must make a *prima facie* showing of entitlement to judgment as a matter of law through the submission of admissible evidence demonstrating the absence of any triable issues of fact (Alvarez v Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]; Zuckerman v City of New York, 49 N.Y.2d 557, 562 [1980]). The burden then shifts to the non-moving party to raise, through submission of admissible evidence, any genuine issue of fact such that a reasonable jury weighing the facts could plausibly find in its favor (Anderson v Liberty Lobby, Inc., 477 U.S. 242, 248 [1986]; Alvarez, *supra* at 324; Zuckerman, *supra* at 562). Summary judgment is appropriate where the evidence, viewed in the light most favorable to the non-moving party, demonstrates the absence of any triable issues of fact (Anderson, *supra* at 249; Winegrad, *supra* at 853). Conversely, summary judgment must be denied where there exists any issue of fact requiring a trial (CPLR § 3212[c]).

Standard for Dismissal

Dismissal of a plaintiff's complaint on the merits is appropriate where such complaint, if all allegations within it are taken as true, nevertheless fails to state a cause of action for which relief can be granted (CPLR § 3211[a][7]) or states a claim to which defendant has, through documentary evidence, established a valid defense (CPLR § 3211[a][1]). Where dismissal is sought under [a][7], pleadings must be liberally construed and the court must afford to plaintiff all favorable inferences. Thereafter, the court need only determine whether the facts as alleged fit into "any cognizable legal theory" (Nonnon v City of New York, 9 N.Y.3d 825 [2007]; Leon v Martinez, 84 N.Y.2d. 83, 88 [1994]). Any view of the evidence that creates a cognizable claim, regardless of whether plaintiff has properly asserted such claim, requires a denial (Sokoloff v Harriman Estates Development Corp., 96 N.Y.2d 409, 414 [2001]; Martinez, *supra* at 87-88). Where a defendant seeks to dismiss a cause of action by asserting a defense grounded upon documentary evidence, such evidence must be unambiguous and incontrovertible, such that it resolves all factual issues as a matter of law and conclusively disposes of plaintiff's claim (AG Cap. Funding Partners, L.P. v State Street Bank and Trust Co., 5 N.Y.3d 582, 590-591 [2005]; Held v Kaufman, 91 N.Y.2d 425, 430-431 [1998]).

Plaintiff's Motion

It is well-settled law that, in order to demonstrate *prima facie* entitlement to summary judgment, a plaintiff in an action to foreclose upon property mortgaged as security for a debt must tender three things: (1) the mortgage, (2) the unpaid note and (3) evidence of the default (Deutsche Bank Nat. Trust Co. v Whalen, 107 A.D.3d 931, 932 [2d Dept 2013]; Wells Fargo

Bank, N.A. v Cohen, 80 A.D.3d 753, 755 [2d Dept 2010]; U.S. Bank Nat. Ass'n Trustee v Butti, 16 A.D.3d 408, 408 [2d Dept 2005]). As the foreclosure action at bar is premised upon the October 1, 2008 Note and Mortgage in the amount of $210,000, these are the only agreements relevant to the instant motion for summary judgment. The plaintiff has produced all of the items required for judgment to be rendered in her favor. The only question before the court is whether the evidentiary tender is sufficient to eliminate all triable issues of fact.

The October 1, 2008 Mortgage Note, annexed to plaintiff's pleadings, memorializes the promise made by defendant EPS, and signed by defendant SINGH as President of EPS, to pay to plaintiff the principal sum of $210,000 (*see* Pl. Ex. "C," Mortgage Note, Oct. 1, 2008). The Note specifies the consequences of default and states that it is secured by a mortgage on the Property (*id.*). In the defendants' opposing papers, they raise no issue as to the validity of the Note on its face. Defendants do not allege that the signature is invalid or that it was obtained under duress,[1] by fraud[2] or misrepresentation[3] or by any other means that would provide an affirmative defense to enforcement of a contract. Rather, they admit in their papers that Defendant SINGH executed the Note.[4] Further, Defendant SINGH acknowledged in his deposition testimony that he was familiar with the document and identified it as the Mortgage Note.[5] Nonetheless, defendants claim that the Note is defective. They submit no proof and no case law in support of such claim.

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[1] *See, e.g.*, 805 Third Ave. Co. v M.W. Realty Assocs., 58 N.Y.2d 447 [1983].
[2] *See, e.g.*, Citibank v Plapinger, 66 N.Y.2d 90; [1985]; Piedra v Vanover, 174 A.D.2d 191 [2d Dept 1992].
[3] *See, e.g.*, ACA Financial Guar. Corp. v Goldman, Sachs & Co., 25 N.Y.3d 1043 [2015].
[4] The affirmation of counsel for defendants states: "On October 1, 2008, Singh, as an officer of Eastern executed the said $210,000.00 note and a mortgage as security for said amount." *See* Mittal v Eastern Parkway Service Inc., Index No. 508173/2014, Aff. In Supp. of Cross Motion and in Opp. To Pl. Motion for Summary Judgment, ¶5.
[5] See Pl. Ex. "X," Dep. Tr. of Def. Brinder Pal Singh, p.50, ¶¶12-22:

Q: Mr. Singh, take a moment and review Plaintiff's Exhibit 9, please.
A: (Witness Complies.)
Q: Are you familiar with Plaintiff's Exhibit 9?

Similarly, the pleadings establish defendant EPS' default. In her complaint, plaintiff sets forth the existence of the recorded mortgage in the amount of $210,000 and the personal guaranty purportedly signed by defendant SINGH (see Pl. Ex. "I," Complaint, Sept. 5, 2014, ¶¶9-10, 16-23).[6] She further alleges that defendant EPS defaulted on its obligation by failing to make payment as agreed[7] and that defendant SINGH also failed to make payment after she made a written demand upon him.[8] In defendants' answer, they assert several affirmative defenses, none of which contends that either EPS or defendant SINGH made any payments under the Note and Mortgage.[9] Thus, defendants admit to the default in their answer.[10] The deposition testimony of defendant SINGH substantiates the default as well.[11] [12]

A: Yes.
Q: How are you familiar with that document?
A: That document is $210,000.
Q: What is this document?
A: This is [sic] mortgage note.

[6] The personal guaranty was executed concomitantly with the Mortgage. A second guaranty was purportedly signed as part of a forbearance agreement which extended the payment date of the Note and Mortgage to October 14, 2013. *See* Pl. Ex. "I," Complaint, Sept. 5, 2014, ¶23; Pl. Ex. "F," Guaranty of Payment, Oct. 1, 2008; Pl. Ex. "G," Forbearance Agreement, Apr. 19, 2013.
[7] Pl. Ex. "I," Complaint, Sept. 5, 2014, ¶24.
[8] Pl. Ex. "I," Complaint, Sept. 5, 2014, ¶27.
[9] *See, generally*, Pl. Ex. "M," Verified Answer," Nov. 18, 2014.
[10] *Id.*
[11] See Pl. Ex. "X," Dep. Tr. of Def. Brinder Pal Singh, p.52, ¶¶19-25; p.53, ¶¶1-4:

Q: Have you paid back any of the $60,000?
A: No.
Q: Why not?
A: Because I kept the notes, $210,000, that's included there.
Q: Go to the Plaintiff's 9, the mortgage note, the $210,000 note. Have you paid back any of that?
A: No.

[12] See Pl. Ex. "X," Dep. Tr. of Def. Brinder Pal Singh, p.54, ¶¶10-23:

Q: I'm going to ask it again, did you, BP Singh, pay back any of the $210,000 referenced in the mortgage note that's Plaintiff's Exhibit 9?
A: No.
Q: Has Eastern Parkway Service, Inc. paid back any of the $210,000 referenced in the mortgage note [sic] marked as Plaintiff's Exhibit 9?

The remaining consideration before the court is whether the Mortgage given by EPS to plaintiff is valid. The Mortgage Instrument, annexed to plaintiff's Notice of Motion (Pl. Ex. "E," Mortgage, Oct. 1, 2008) and defendants' Notice of Cross Motion[13] was made between defendant EPS as Mortgagor and plaintiff MITTAL as Mortgagee; and was executed by defendant SINGH as President of EPS (*id.*). It contains the recitations that the mortgage is given to secure the payment of the $210,000 debt admitted to by defendants[14] and that the property being mortgaged is the premises owned by defendant EPS at 1412 Eastern Parkway, Brooklyn, New York (*id.*). It delineates the rights and obligations of the respective parties to the Mortgage and, in standard legal language, designates the entirety of the agreement as binding covenants.[15] It states that the Mortgage is duly executed by the mortgagor (*id.*). The mortgage instrument is notarized (*id.*) and recorded.[16] Here again, defendants raise no issue as to the validity of the mortgage instrument on

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A: Say again.
[Counsel for defendants]: Can you read that back.
(Record read as requested.)
A: No.

[13] Def. Ex. "C," Mortgage, Oct. 1, 2008 (annexed without signature page).
[14] See fn4, *supra*. The court notes here that, by signing a forbearance agreement on April 19, 2013 in both his individual capacity and his capacity as President of EPS, defendant Singh reaffirmed and ratified the existence of the debt.
[15] The Mortgage Instrument states, in pertinent part: "The covenants contained in this mortgage shall run with the land and bind the mortgagor, the heirs, personal representatives, successors and assigns of the mortgagor and all subsequent owners, encumbrancers, tenants and subtenants of the premises, and shall enure to the benefit of the mortgagee, the personal representatives, successors and assigns of the mortgagee and all subsequent holders of this mortgage." Pl. Ex. "E," Mortgage, Oct. 1, 2008.
[16] *See* Albany Cty. Sav. Bank v McCarty, 149 N.Y. 71, 78 [1896]["[A] conveyance, acknowledged or proved, and certified in the manner prescribed by law to entitle it to be recorded in the county where it is offered, is evidence, without further proof thereof"]; Albin v First Nationwide Network Mortg. Co., 248 A.D.2d 417, 418 [2d Dept 1998]["A certificate of acknowledgment attached to an instrument such as a deed raises a presumption of due execution, which presumption... can be rebutted only after being weighed against any evidence adduced to show that the subject instrument was not duly executed"][internal citation omitted]; Son Fong Lum v Antonelli, 102 A.D.2d 258, 261 [2d Dept 1984][finding for defendants where plaintiff, seeking to void a deed and subsequent deed as well as a mortgage and subsequent assignment of mortgage on the subject property, "failed to come forward with proof of the nature required to rebut the presumption of due execution arising from the notary's certificate of acknowledgement"].

its face. Rather, they seek cancellation of the Note and Mortgage pursuant to their contention that the same are legally void and a dismissal of the action based on their affirmative defenses. Defendants' counterclaims have no bearing on the instant motion and cross motion.

Defendants' Cross Motion

Defendants argue that the October 1, 2008 Note and Mortgage are void because they were made by defendant EPS to secure a combined $210,000 debt, $60,000 of which was incurred by defendant SINGH on behalf of Nostrand Dean Car Wash Inc., a corporation unrelated to EPS. They rely on New York Jurisprudence 2d for the propositions that "a corporation does not have the authority to bind itself by assuming the debt of another, unless there is consideration therefor" and "[t]he fact alone that one individual owns all the stock in a corporation does not authorize the corporation to assume his or her indebtedness."[17] Defendants' argument rests on the contention that no consideration existed for the assumption of the $60,000 debt by EPS since no benefit flowed directly to EPS. However, such contention here is plainly false. Consideration may consist of either a benefit to the promisor or a detriment to the promisee.[18] That plaintiff MITTAL incurred a detriment in extending the time for payback of the $60,000 loan is without question. It is also without question that EPS benefitted from the influx of available funds-- as defendant SINGH testified, he was short on money and used the $210,000 sum to reinvest in and rebuild the gas station located on the premises,[19] which is the major asset of EPS. Because

[17] See Mittal v Eastern Parkway Service Inc., Index No. 508173/2014, Aff. In Supp. of Cross Motion and in Opp. To Pl. Motion for Summary Judgment, ¶8.
[18] Weiner v McGraw-Hill, Inc., 57 N.Y.2d 458, 464 [1982]; Anand v Wilson, 32 A.D.3d 808, 809 [2d Dept 2006].
[19] See Pl. Ex. "X," Dep. Tr. of Def. Brinder Pal Singh, p.54, ¶¶15-25; p.55, ¶¶1-9.

defendant SINGH had singular knowledge of the financial affairs of the business and was also authorized to act on behalf of EPS, it is reasonable to infer that increased cash flow was a bargained-for benefit.[20]

Defendants misapprehend the application of the word "authority" as it is used in the context of the Business Corporation Law. They fail to differentiate between those transactions that are void as a matter of law[21] and those transactions that a corporation cannot enter without abusing the lawful corporate form, although the corporation may still be bound by them.[22] When a corporate officer or director acts in a manner that is outside the scope of the corporation's charter, resulting in harm to the corporation and its shareholders or other parties, the defense of *ultra vires* arises. The corporation may avoid responsibility where it had no knowledge of the act of the individual officer or director.[23] However, where a corporate officer or director commits an illegal act and where the corporation had knowledge of same and thereby ratified it, the defense of *ultra vires* fails.[24] Here, defendant SINGH is the sole officer, sole shareholder and President of EPS. He alone controls the corporation's affairs and has the authority to act on its behalf. He was within the scope of his authority to execute agreements on behalf of EPS and, as the only member of the corporation, had full knowledge of what he was undertaking in pledging

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[20] *See, e.g.*, Bank Leumi Trust Co. of N.Y. v Andrews, 254 A.D.2d 445, 445-46 [2d Dept 1998][affirming judgment for plaintiff where debtors pledged corporate property of one corporation they controlled to secure indebtedness of another and also executed a personal guaranty for the debt].

[21] *See, e.g.*, Village of Fort Edward v Fish, 156 N.Y. 363, 373-74 [1898]; Knapp v Rochester Dog Protective Ass'n, 235 A.D. 436, 439 [4th Dept 1932][plaintiff, an officer and director of defendant corporation, was denied recovery on a contract made with the corporation where the making of the contract was prohibited by statute].

[22] *See* Vought v Eastern Building & Loan Ass'n, 172 N.Y. 508, 517 [1902]["While [corporations] have no right to violate their charters, they yet have capacity to do so, and are bound by their acts where a repudiation of them would result in manifest wrong to innocent parties"].

[23] *See* Credit Alliance Corp. v Sheridan Theater Co., 241 N.Y. 216 [1925].

[24] *See* Dyer v Broadway Central Bank, 252 N.Y. 430, 435 [1930]["This court has adopted a more liberal rule, holding that not all *ultra vires* contracts are void, but that some are voidable only, and that a corporation which seeks to avoid such a contract must plead the facts entitling it to do so"]; Bath Gaslight Co. v Claffy, 151 N.Y. 24 [1896].

the property owned by EPS as collateral for a debt. "It is now well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party and the corporation has had the benefit of the performance and of the contract" (Vought v Eastern Building & Loan Ass'n, *supra* fn22, at 517]). Plaintiff MITTAL, in reliance on defendant SINGH's pledge, fulfilled her end of the agreement by extending the loaned amount. Thus, defendants are equitably estopped from asserting the illegality of SINGH's act as a defense (*id.*).

Defendants' second argument on their cross motion is that the personal guaranty executed by defendant SINGH is defective because there was no $210,000 loan from plaintiff to EPS for which defendant SINGH could personally guarantee payment. They repeat that the $150,000 portion of the debt was for defendant SINGH's purchase of plaintiff's shares of stock and that the $60,000 portion was a debt illegally assumed by EPS. Thus, even accepting as true defendants' assertion that there was no loan made to EPS, such alleged "defect" would be of no consequence with respect to $150,000 of the debt, since a personal guaranty is not required to bind defendant SINGH to repayment of an obligation that is admittedly his. The validity of the $60,000 portion of the debt is established herein and the guaranty may be enforced with respect to that portion.[25]

Defendants' claim that "SINGH is signing the guaranty partly as an officer of Eastern and should not be held individually liable"[26] is nonsensical. A person cannot execute an agreement

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[25] The language of the guaranty provides, in pertinent part, that "[n]o invalidity, irregularity or unenforceability of all or any part of the liabilities hereby guaranteed or of any security therefor shall affect, impair or be a defense to this guaranty, and this guaranty is a primary obligation of [guarantor]." Pl. Ex. "F," Guaranty of Payment, Oct. 1, 2008.

[26] Mittal, Aff. In Supp. of Cross Motion and in Opp. To Pl. Motion for Summary Judgment, ¶17.

wearing half of a hat and thus avoid being bound. A person can, however, execute an agreement wearing multiple hats and thus bind multiple parties. The signature page of the 2008 guaranty contains two signatures—one of BRINDER PAL SINGH and one of BRINDER PAL SINGH as President of EASTERN PARKWAY SERVICE INC.[27] Moreover, the guaranty refers to defendant EPS as "guarantor" and to defendant SINGH as "guarantor" and clearly states that they are jointly and severally liable for the outstanding debt.[28]. Defendant SINGH's assertions that he should not be personally liable only serve to shift liability to defendant EPS—the debt remains.

The next argument defendants attempt is that the affidavit of plaintiff MITTAL submitted in support of her motion is defective, that she lacks personal knowledge of the circumstances of the loans and agreements and that her affidavit should thus be disregarded. However, contrary to defendants' belief, the fact that plaintiff testified to having no personal knowledge about the loans is irrelevant to the decision on the instant motion. Firstly, as noted above, defendant SINGH admits, at various points in both his deposition testimony and his pleadings, to the existence of the $210,000 obligation, how it was comprised and what it was used for.[29] Secondly, as outlined previously, on a motion for summary judgment of foreclosure, the plaintiff need only produce the mortgage, the unpaid note and evidence of the default. A plaintiff's personal knowledge in a foreclosure action is used to establish standing when standing is at issue (Aurora Loan Servs., LLC v Taylor, 25 N.Y.3d 355 [2015]; Deutsche Bank Nat. Trust Co. v Naughton, 137 A.D. 3d 1199 [2d Dept 2016]). It may be required, for example, to prove possession of the note or

[27] See Pl. Ex. "F," Guaranty of Payment, Oct. 1, 2008, p.8; Def. Ex. "F," Guaranty of Payment, Oct. 1, 2008, p.8.
[28] See Pl. Ex. "F," Guaranty of Payment, Oct. 1, 2008, pp.1, 5¶16.
[29] *See* fn4, 5, 11, 12 and 19, *supra.*

demonstrate continuity in a series of assignments. However where, as here, a plaintiff produces the mortgage, unpaid note and evidence of default, she has met her *prima facie* burden.

Defendants argue in their eighth affirmative defense and second counterclaim that there was a mutual mistake with regard to the valuation of the property and the shares, rendering the Note defective. This argument, however, is unavailing. The Note merely references the purchase amount arrived at by plaintiff and defendant SINGH in negotiating the October 1, 2008 Agreement[30] by which plaintiff sold her stock and resigned from the corporation—a contract which is wholly separate from and independent of the Note. While the subject of the Agreement is an exchange of stock shares for a sum certain, the subject of the Note is the conveyance of a security interest as collateral for the promise to pay a debt. A claimed mistake with regard to the valuation of the stock shares affects the former, not the latter. Notably, defendants have not commenced an action to rescind or reform the October 1, 2008 Agreement.

Plaintiff points to the indemnification clause in the October 1, 2008 Agreement[31] not for the purpose of showing that she is entitled to indemnification, but rather, for the purpose of showing that, in making their agreement, the parties expressly contemplated the possibility of environmental contamination at the site. It cannot be said that mutual mistake existed if the parties contemplated a particular circumstance or condition and chose to proceed with their agreement without first determining how that circumstance or condition, if present, would

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[30] Pl. Ex. "B," Agreement, Oct. 1, 2008.

[31] The Agreement states, in pertinent part: "[Buyer] hereby indemnifies and holds [seller] harmless from any and all claims, suits and taxes involving the [corporation], regardless of the date incurred, including any and all environmental and/or hazardous waste claims and/or suits involving the [premises], and further including [seller's] reasonable attorney fees." Pl. Ex. "B," Agreement, Oct. 1, 2008, p.1¶3.

materially alter the agreement. In so doing, they each accepted the risk of their ignorance.[32] In fact, defendants' pleadings assert that Phase I and Phase II environmental inspections were conducted on the property in 2008 and 2010, respectively, in anticipation of applying for a mortgage. Yet, a mortgage had been given to plaintiff on the same property without the benefit of environmental inspections. When the alleged contamination was discovered,[33] defendant SINGH had already defaulted on his obligations under the Note. He also entered into a forbearance agreement with plaintiff in 2013,[34] thereby ratifying the debt even after the parties were aware of potential leaks at the site.

Defendants' final contention is that plaintiff should not be entitled to the appointment of a receiver since she has not made a showing pursuant to CPLR §6401[a]. However, plaintiff is not required to make such a showing. The appointment of a receiver is at the court's discretion in a foreclosure action, because the inability to meet one's financial obligations in respect to real property may be sufficient to create an inference of danger that the property will be materially injured or destroyed.[35] Furthermore, the mortgage instrument itself, which defendant SINGH

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[32] *See* Chimart Assocs. v Paul, 66 N.Y. 2d 570, 574 [1986]["To this end—for freedom to contract would not long survive courts' ready remaking of contracts that parties have agreed upon—reformation has been limited both substantively and procedurally. Substantively, for example, reformation based upon mistake is not available where the parties purposely contract upon uncertain or contingent events"][internal citations and quotations omitted].
[33] *See* Def. Ex. "I," Preliminary Phase II Subsurface Investigation Report, Oct. 15, 2010.
[34] *See* fn6, *supra*.
[35] *See* Wyckoff v Scofield, 98 N.Y. 475, 477 [1885]["In a proper case upon foreclosure [the mortgagee] may have a receiver of such rents, etc. appointed who will then be entitled to collect and apply them in reduction of the mortgage debt..."]; Ranny v Peyser, 83 N.Y. 1, 1 [1880]["Plaintiff, a mortgagee of a leasehold interest in certain premises, was, upon his own application, appointed receiver of the rents and profits of the premises, and the order directed him to keep the buildings insured and in repair and to pay the ground rent and taxes"]; Lofsky v Maujer, 3 Sand Ch. 69, 69-70 [1845]["A mortgagee, whose debt is all due and is defectively secured, by procuring a receiver, obtains an equitable lien on the unpaid rents of the lands mortgaged... The whole object of this proceeding, is to divert the unpaid rents from the mortgagor to the mortgagee"].

executed as President of EPS, explicitly states that plaintiff is entitled to that relief in an action to foreclose.[36]

Defendants' Affirmative Defenses

Defendants seek dismissal of the action based on eight affirmative defenses. The first of these, which alleges that plaintiff failed to effectuate proper service, is waived by defendants' appearance in the action as they have answered the Summons and Complaint and not asserted that the court otherwise lacks personal jurisdiction. Defendants' second, third and fourth affirmative defenses all pertain to the 2006 Promissory Note, which is not relevant to the foreclosure on the 2008 Mortgage. The court has considered defendants' remaining defenses and finds them to be without merit.

As plaintiff MOHINI MITTAL has met her *prima facie* burden in this action to foreclose a mortgage on the Property, she is entitled to judgment as a matter of law on her claims. Defendants EPS and BRINDER PAL SINGH have failed to raise any triable issues of fact and have failed to assert any defenses requiring dismissal of the action. Accordingly, plaintiff's motion is GRANTED in its entirety, with costs and subject to the court's approval of one (1) bill of costs with reasonable attorney's fees. Defendants' cross motion is DENIED, in its entirety, with

[36] *See* Pl. Ex. "E," Mortgage, ¶5 ["That the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver"]. New York courts have consistently held such a covenant to obviate the requirement of a showing. *See* Naar v I.J. Litwak and Co., Inc., 260 A.D.2d 613, 614 [2d Dept 1999]["The mortgage agreements at issue each contain a covenant which mandates the appointment of a receiver upon default. Accordingly, the mortgagee was entitled to the appointment of a receiver regardless of proving the necessity for the appointment"]; 366 Fourth St. Corp. v Foxfire Enterprises, Inc., 149 A.D.2d 692, 692 [2d Dept 1989]["[W]here, as in this case, the properties to a mortgage agree that a receiver may be appointed in the event of default, the appointment of a receiver without notice and without regard to the adequacy of security is proper"].

prejudice. Plaintiff is hereby directed to settle an order on notice to all parties for the appointment of a receiver, within thirty (30) days of the date of entry of this order.

This constitutes the DECISION, ORDER and JUDGMENT of the court.

ENTER,

J.S.C.

HON. DAVID B. VAUGHAN

NANCY T. SUNSHINE
Clerk

KINGS COUNTY CLERK
FILED
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