

**Heracles Acquisition Fund X LLC v Bapaz 22
Patchen LLC**

2021 NY Slip Op 32712(U)

December 10, 2021

Supreme Court, Kings County

Docket Number: Index No. 522105/20

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part Comm 6, 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 10th day of December, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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HERACLES ACQUISITION FUND X LLC,

Plaintiff,

- against -

Index No. 522105/20

BAPAZ 22 PATCHEN LLC, STEVEN GOLTSCHE, BANK OF AMERICA, N.A., AS SUCCESSOR TO NATIONAL FINANCIAL CO., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU and "JOHN/JANE DOE NO. 1" through "JOHN/JANE DOE NO. 5", the last five names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons, corporations, or other entities, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____

28-32, 34 35-38 44-47
43 46-47

Upon the foregoing papers in this commercial foreclosure action, defendant Bapaz 22 Patchen LLC (Bapaz) moves (in motion sequence [mot. seq.] one) for an order (1)

precluding plaintiff Heracles Acquisition Fund X LLC (Heracles) from presenting any evidence in support of its complaint and directing that all issues be resolved in Bapaz's favor, pursuant to CPLR 3126, based on Heracles' failure to respond to Bapaz's discovery demands, and (2) awarding Bapaz the full costs of this motion, including attorneys' fees and expenses of at least \$5,000.00.

Defendant Steven Goltche (Goltche) moves (in mot. seq. two) for an order (1) granting him a default judgment against Heracles based on its failure to reply or otherwise respond to Goltche's counterclaims, and (2) setting this matter down for an inquest on Goltche's damages. Heracles cross-moves (in mot. seq. three) for an order, pursuant to CPLR 2004, granting it leave to file a late reply to Goltche's counterclaims.

On November 9, 2020, Heracles commenced this action by filing a summons and a complaint seeking to foreclose on a commercial mortgage encumbering the property at 22 Patchen Avenue in Brooklyn (Property).

On February 5, 2021, defendant Bapaz (the alleged borrower) answered the complaint, denied the material allegations therein and asserted affirmative defenses. On March 1, 2021, defendants Bapaz and Goltche collectively filed a verified answer to the complaint with counterclaims. On March 3, 2021, defendants Bapaz and Goltche collectively filed an amended verified answer to the complaint in which they denied the material allegations therein, asserted affirmative defenses and set forth the following eight counterclaims against Heracles: (1) to void the loan as unconscionable; (2) dismissing

the complaint for lack of standing; (3) a declaration that Heracles has rendered defendant's title in the Property unmarketable; (4) a declaration quieting title to the Property; (5) estoppel because Heracles' is not the holder in due course of the underlying note; (6) negligence; (7) negligence; and (8) violation of New York General Business Law § 349.

Heracles failed to reply to or otherwise respond to defendants' counterclaims.

On June 21, 2021, defendant Bapaz served Heracles with a notice of discovery and inspection of documents, the responses to which were due on July 12, 2021. On July 20, 2021, defense counsel sent Heracles' counsel a "good faith" letter inquiring about the discovery requests.

On August 12, 2021, Bapaz moved for an order precluding Heracles from presenting any evidence at trial and directing that all issues be resolved in its favor, pursuant to CPLR 3126, based on Heracles' "arbitrary and inexcusable failure and refusal to respond" to its discovery demands. On October 22, 2021, while Bapaz's motion to preclude was pending, Heracles produced the requested documents.

Heracles, in opposition, submits an attorney affirmation asserting that the relief requested is unwarranted because "there has been no preliminary conference scheduled and no Preliminary Conference Order by the Court, the documents were demanded in late June 2021, and the Plaintiff has responded to the discovery demands on October 22, 2021." Thus, Bapaz's motion to preclude has been rendered moot since Heracles

produced the requested documents.

On September 3, 2021, defendant Goltche moved for a default judgment against Heracles based on its failure to reply or otherwise respond to defendants' counterclaims. On October 22, 2021, Heracles cross-moved, pursuant to CPLR 2004, for an order granting it leave to file a late reply to defendants' counterclaims due to law office failure. Notably, defendants failed to oppose Heracles' cross motion. Accordingly, it is hereby

ORDERED that the branch of defendant Bapaz's motion (mot. seq. one) seeking to preclude Heracles, pursuant to CPLR 3126, is denied as moot, and the branch of the motion seeking an award of attorneys' fees is denied as unwarranted; and it is further

ORDERED that Heracles' cross motion (mot. seq. three) is granted without opposition, and Heracles shall file its reply to defendants' counterclaims within 30 days of service of this decision and order with notice of entry thereof; and it is further

ORDERED that defendant Goltche's motion (mot. seq. two) is denied as moot.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE