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SHORT FORM ORDER

COPY

INDEX No. 10-24347

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 12-8-10 (#001)
MOTION DATE 12-22-10 (#002)
ADJ. DATE 4-16-11
Mot. Seq. # 001 - MG
002 - XMD

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BANK OF SMITHTOWN,

Plaintiff,

- against -

219 SAGG MAIN LLC; BENJAMIN RINGEL, YAEL RINGEL, PEOPLE OF THE STATE OF NEW YORK, "JOHN DOE ONE" to an including "JOHN DOE TEN"; the last names being fictitious and unknown to the plaintiff(s); the persons or parties intended being the tenants; occupants persons or parties, if any having or claiming an interest in or lien upon the premises described in the complaint known as 219 SAGAPONACK MAIN STREET, SOUTHAMPTON, NEW YORK,

Defendants.

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Upon the following papers numbered 1 to 3 read on this motion by the plaintiff for summary judgment and a order of reference . Proposed order and supporting papers 1-27 ; Notice of Cross Motion and supporting papers 1-9 ; Defendants memorandum of Law. Answering affirmation and Affidavits and supporting papers 1-3 And Plaintiff's Memorandum of Law in Support of the Motion for summary Judgment and opposition to Cross-Motion; Defendants Reply Memorandum of Law and the aforesaid having been submitted to the undersigned, and with due consideration and deliberation it is,

ORDERED that this motion by plaintiff for an order (a) pursuant to CPLR 3212 granting summary judgment dismissing the defendants' answer; (b) amending the caption of this action; and (c) appointing a referee to compute pursuant to CPLR 4301 and CPLR 4311, is granted; and it is further

ORDERED that the cross motion by the defendant pursuant to CPLR 3025 (b) and CPLR 305 (a) for an order granting leave to defendants 219 Sagg Main LLC, Benjamin Rigel and Yael Rigel to serve a supplemental and third-party summons joining Bradley E. Rock, Jr., as an additional counterclaim defendant herein and granting leave to serve an amended answer with counterclaims in the form annexed therein is denied; and it is

ORDERED that the plaintiff, Bank of Smithtown, shall serve a copy of this order with notice of entry upon counsel for the defendants within forty-five (45) days of the date of this order and thereafter file the affidavit of service with the Clerk of the Court; and it is further

ORDERED that the plaintiff shall submit a proposed Order of Reference on notice, along with a copy of this order, to the court within forty-five (45) days following entry of this order.

In this foreclosure action, the plaintiff Bank of Smithtown (hereinafter Smithtown) seeks to foreclose on matured mortgages in an aggregate sum of seven million one hundred twenty-five thousand dollars ($7,125,000.00) on an investment property located at 291 Sagaponack Main Street, Sagaponack, New York. Said mortgages were given by the defendant 219 Sagg Main LLC (hereinafter 219 Sagg Main) and were guaranteed by the defendants Benjamin Ringel and Yael Ringel (hereinafter collectively Ringels). It is alleged that 219 Sagg Main subsequently defaulted on the mortgages when it failed to respond to Smithtown's commitment letter of April, 2010. As a consequence, Smithtown elected to accelerate the entire mortgage debt. Issue was joined by the service of 219 Sagg Main's answer on or about September 14, 2010.

Smithtown has established its entitlement, prima facie, to summary judgment in this foreclosure action by the submission of the supporting affidavit of Robert Staron, a Vice President of Smithtown attesting to the defendants' default in payment of the notes, the affirmation of Smithtown's counsel, copies of the underlying mortgage documents, including Ringels' guarantees and proof of documentary evidence of defendant 219 Sagg Main's default and non-payment under the terms thereof (*see* CPLR 3212, RPAPL § 1321; ***Argent Mtge. Co., LLC v Mentesana,*** 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; ***North Bright Capital, LLC v 705 Flatbush Realty, LLC,*** 66 AD3d 977, 889 NYS2d 596 [2d Dept 2009]; ***Bercy Invs. v Sun,*** 239 AD2d 161, 657 NYS2d 47 [1st Dept 1997]; ***Bank of Leumi Trust Co. of New York v Lightning Park, Inc,*** 215 AD2d 246, 626 NYS2d 202 [1st Dept 1995]; ***Village Bank v Wild Oaks Holding, Inc.,*** 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]; ***Gould v McBride,*** 36 AD2d 706, 319 NYS2d 125 [1st Dept 1971]; *aff'd* 29 NY2d 708, 36 NYS2d 565 [1971]) and other proof that it is a current holder in due course of the valid mortgages executed by 219 Sagg Main (*see* ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]).

Plaintiff has established and 219 Sagg Main does not deny the existence of the mortgages and the past due, unpaid mortgage balance (S*ee* ***CitiFinancial Co. (DE) v McKinney,*** 27 AD3d 224, 811 NYS2d 359 [1st Dept 2006]; ***LLP Mortgage Ltd, Formerly Known as Loan Participant Partners Ltd v Card Corp.***, 17 AD3d 103, 739 NYS2d 246 [1st Dept 2005]; *reargmt den by* 2005 N.Y. App. Div. [1st Dept 2005]; *lv app den*, 6 NY3d 702, 810 NYS2d 417 [2005]; ***Hypo Holdings, Inc. v Chalasani***, 280 AD2d 386, 721 NYS2d 35 [1st Dept 2001]; *lv app den* 96 NY2d 717, 730 NYS2d 79 [2001]; ***Northeast Sav. v Rodriguez,*** 159 AD2d 820, 553 NYS2d 490 [3d Dept 1991]; *app dism* 76 NY2d 889,

561 NYS2d 550 [1990]). Thus, Smithtown has made a prima facie showing of its entitlement to summary judgment by the submission of uncontested proof of 219 Sagg Main's default as well as the notes, mortgages, and the personal guarantees of the Ringels.

Since Smithtown has proffered documentary evidence of its entitlement to summary judgment, it was incumbent upon 219 Sagg Main to submit proof rebutting plaintiff's prima facie showing and establishing one or more of its affirmative defenses or counterclaim sufficient to raise a triable issue of fact as to a bona fide defense such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of Smithtown (*see* ***Neighborhood Hous. Serv. Of New City v Meltzer,*** 67 AD3d 872, 889 NYS [2d Dept 2009]; ***Washington Mutual Bank v O'Conner,*** 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009] ***CitiFinancial Co. (DE) v McKinney,*** 27 AD3d 224, *supra*; ***Mahapac National Bank v Baisley,*** 244 AD2d 466, 664 NYS 345 [2d Dept 1997]; *lv app dism,* 91 NY2d 1003, 676 NYS2d 129 [1998]; ***Marine Midland Bank, N.A. v Freedom Rd. Realty Assoc.,*** 203 AD2d 538, 611 NYS2d 34 [2d Dept 1994]; ***LLP Mortgage Ltd, fka Loan Participant Partners Ltd v Card Corp.***, 17 AD3d 103, *supra*; ***Hypo Holdings, Inc. v Chalasani***, 280 AD2d 386, *supra; Village Bank v Wild Oaks Holding, Inc.,* 196 AD2d 812, *supra*; ***Marton Assoc. v Vitale,*** 172 AD2d 501, 568 NYS2d 119 [2d Dept 1991]; ***Andre v Pomery,*** 35 NY2d 362 NYS2d 131 [1974]; *cf* ***Nassau Trust Co. v Montrose Concrete Products Corp.,*** 56 NY2d 175, 451 NYS 663 [1982] *reargmt den* 57 NY2d 674 [1982]). A review of 219 Sagg Main's opposition papers reveals that it has failed to sustain its burden of submitting evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial (*see* CPLR 3212; ***Giuffrida v Citibank Corp.***, 100 NY2d 72 [2003]).

219 Sagg Main's general denials are insufficient, as a matter of law. Summary judgment will be granted to a plaintiff when "[an] answer proffers nothing more than general denials" (***Fairbanks Co. v Simplex Supply Co.,*** 126 AD2d 882, 511 NYS2d 171 [3d Dept 1987]). Bare denials, such as those asserted by 219 Sagg Main, without more, are insufficient to defeat plaintiff's motion for summary judgment (*see* ***1130 Anderson Ave. Realty Corp. v Mina Equities Corp.,*** 95 AD2d 169, 465 NYS2d 511 [1st Dept 1983]). "Where . . . the cause of action is based upon documentary evidence, the authenticity of which is not disputed, a general denial, without more, will not suffice to raise an issue of fact" (***Gould v McBride,*** 36 AD2d 706, 319 NYS2d 125 [1st Dept 1971]; *affd* 29 NY2d 768, 326 NYS2d 565 [1971]).

With respect to 219 Sagg Main's first affirmative defense wherein it alleges that the plaintiff comes to this Court with "unclean hands," it is well settled that the doctrine is not a recognized defense to a foreclosure action *(see* ***Amherst Factors, Inc., v Kochhenberger,*** 4 NY2d 203, 173 NYS 598 [1958]; ***First Family Mortgage Corp., of Florida v Lubliner,*** 113 AD2d 868, 493 NYS2d 598 [2d Dept 1985]. The "unclean hands" doctrine as a defense in a foreclosure was specifically rejected by the Court of Appeals in ***Jo Ann Homes at Bellmore, Inc., v Dworetz,*** 25 NY2d 112, 302 NYS 799 [1969] where it held at 112:

> "Plaintiffs now contend that the doctrine of 'unclean hands' should prevent the defendants from proceeding with the foreclosure. Concededly, a foreclosure action is a 'proceeding in equity which is regulated by statute' (***Dudley v Congregation of Third Order of St. Francis,*** 138 NY 451, 457, 138 NY 451; *see also* ***Amhert Factors, Inc.,***

> ***v Kochenburger,*** 4 NY2d 203. Nevertheless, it is well settled that such a proceeding is unlike other equity actions in several ways. Thus, while equity acts only in personam, an action for foreclosure 'is in the nature of a proceeding in rem to appropriate the land' (***Richert v Stilwell***, 172 NY 83, 89)."

Accordingly, the affirmative defense of unclean hands lacks merit and is stricken as a matter of law.

Smithtown asserts that the defendant's second, third and fourth affirmative defenses are without merit, as they apply to real property owned by a natural person, whereas the owner of the property being foreclosed herein is a corporation. The notice requirements of RPAPL §§ 1302 and 1303 do not apply, as the property is not owner occupied, the construction loans are neither "high cost home loans nor sub-prime home loans", and it is an investment property owned by a corporation. Moreover, the provisions of CPLR 3408 provide for a mandatory settlement conference in any residential foreclosure action involving a "home loan" as defined pursuant to RPAPL § 1304. Here, the documents produced by Smithtown demonstrate that the property in question is owned by a corporation, and the loans are a series of construction loans, a fact not controverted by the individual defendants. Therefore, the within foreclosure action does not fit within the criteria for inclusion in the residential foreclosure program. Accordingly, the second, third and fourth affirmative defenses lack merit and are dismissed as a matter of law.

219 Sagg Main's fifth, sixth and seventh affirmative defenses plead promissory estoppel arising from a "course of dealing" and oppressive and unconscionable conduct. When pleading an affirmative defense, a defendant must set forth facts supporting such affirmative defense. Failure to plead supporting facts renders such affirmative defense defective as a matter of law. An affirmative defense that merely pleads conclusions of law without supporting facts is insufficient and fatally deficient (*see* ***Becher v Feller,*** 64 AD3d 672, 884 NYS2d 83 [2d Dept 2009]). Here, 219 Sagg Main's fifth, sixth and seventh affirmative defenses are conclusory statements without any factual basis. Accordingly, the fifth, sixth and seventh affirmative defenses are dismissed as a matter of law.

In any event, 291 Sagg Main has failed to demonstrate that any of the defenses raised in its answer are potentially meritorious or raise a triable issue of fact *(see* ***Wells Fargo Bank v Karla,*** 71 AD3d 1006, 896 NYS2d 681 NYS [2d Dept 2010]; ***Cochran Inv. Co., Inc., v Jackson,*** 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]; ***Barcov Holding Corp. v Bexin Realty Corp.,*** 16 AD3d 282, 792 NYS2d 408 [1st Dept 2005]; ***First Nationwide Bank, FSB v Goodman***, 272 Ad 2d 433, 707 NYS2d 669 [2d Dept 2000]). Moreover, 219 Sagg Main effectively abandoned its affirmative defenses by its failure to assert them in opposition to Smithtown' summary judgment motion.

In opposing the motion, 219 Sagg Main does not deny that it defaulted on the notes and mortgages. Rather, it submits the affidavit of Benjamin Ringel, a member of 219 Sagg Main, and an individually named defendant, who is a sophisticated real estate investor and the owner of significant commercial real estate under a separate corporation. In his affidavit, Ringel does not deny that the money is due and owing on the notes and mortgages. Ringel does not allege misconduct in connection

with the procurement of the notes and mortgages or the underlying transactions. Ringel contends that Smithtown sent the mortgage commitment letter to his commercial company where it admittedly was misplaced and only found after the commitment period set by Smithtown had expired. The vague assertions and unsupported statements made by 219 Sagg Main in its first counterclaim are devoid of merit and fail to set forth factual issues requiring a trial. Significantly, the submissions fail to show that Smithtown wrongfully caused 219 Sagg Main's default or some other condition that led to the foreclosure action (*see* ***Red Tulip, LLC v Neiva*** , 44 AD3d 204, 842 NYS2d 1 [1st Dept 2007]; *app dism* 10 NY3d 709, 853 NYS2d 283 [2008]; *lv app den* 13 NY3d 209, 890 NYS2d 446 [2009]). Nor does 219 Sagg Main submit evidentiary proof such as an affidavit from its mortgage broker to sustain its claim of a "course of dealing" with Smithtown as to the construction loans and any mortgage commitments. Rather, the "course of dealing" between the parties indicates that all correspondence regarding the construction loans was to be forwarded to defendant Ringels' real estate holding company, Armstrong Capital.

219 Sagg Main cross-moves pursuant to CPLR 305 (a) and CPLR 3025 (b) for leave to serve a supplemental and third-party summons joining Bradley E. Rock, Jr., as an additional defendant on the counterclaim, and granting leave to serve an amended answer. CPLR 3025 (b) provides that leave to amend shall be freely given upon such terms as may be just. Nevertheless, whether to grant leave is discretionary with the court (*see* ***Edenwald Contracting Co. v New York,*** 60 NY2d 957, 472 NYS2d 55 [1983]; ***Duffy v Bass & D'Allesandro, Inc.,*** 245 AD2d 333, 664 NYS2d 833 [2d Dept 1997]). Such a predisposition to granting a motion to amend is not unqualified. A movant must first demonstrate [a] the merit of the proposed amendment, and [b] the absence of prejudice or surprise occasioned by the movant's delay in raising the allegedly new matter (*see* ***Sachell v Dowling***, 240 AD2d 721, 722, 662 NYS2d 771, 772 [2d Dept 1977]; ***Marazza v Marrazzo,*** 242 AD2d 273, 274, 651NYS2d 319 [2d Dept 1996]).

On a motion for leave to amend, an inquiry into the merits of the proposed amendment will only be made if the proposed claims are patently insufficient or the lack of merit is "clear and free from doubt" ***(Noanjo Clothing, Inc., v L & M Kids Fashions, Inc.,*** 207 AD2d 436, 437, 615 NYS2d 747, [2d Dept 1994]; *compare* ***Bobrowsky v Lexus,*** 215 AD2d 533, 626 NYS2d 424 [2d Dept 1995]) Here, defendant has not presented facts that were not available to it at the time it filed its answer, and has failed to provide any evidence to support a meritorious claim. 219 Sagg Main has not set forth a recent change in circumstances which justifies the requested amendments or that it is proffered for any other purpose then to foreclose on due notes (*see* ***Greco v Christoffersen,*** 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]).

219 Sagg Main's proposed amended answer consists of the identical general denials, affirmative defenses and counterclaim submitted in opposition to Smithtown's motion for summary judgment and two additional counterclaims. The court notes that 219 Sagg Main incorrectly amended the caption on its cross-motion.

Smithtown opposes the motion to amend and submits the affidavit of Bradley E. Rock, Jr., a Senior Vice President of Smithtown. He refutes the allegations by 219 Sagg Main in its counterclaims and states that failed settlement negotiations occurred after the bank commenced foreclosure proceedings

of the construction loans, and there was never an enforceable agreement between Smithtown and 219 Sagg Main whereby Smithtown agreed to provide permanent mortgage financing. Smithtown offered 219 Sagg Main a commitment to convert the construction loans to a permanent mortgage. The offer was never accepted according to its terms and subsequently expired.

219 Sagg Main's second counterclaim alleges misconduct by a bank official after its default and regarding its efforts to avoid the consequential effects of its default. This counterclaim alleging economic duress fails to state a cause of action. A party cannot be guilty of economic duress for refusing to do something which it is not legally required to do (*see* ***805 Third Ave. v M.W. Realty Assocs,*** 58 NY2d 447, 461 NYS2d 778 [1983]). The third counterclaim wherein 219 Sagg Main seeks to assert that Smithtown's unilateral action will have a negative effect on defendant's credit standing and property title is unpersuasive. It is undisputed that the defendants defaulted on their mortgage (*see* ***Great Western Bank v Terio,*** 200 AD2d 608, 606 NYS2d 903 [2d Dept 1994]; *app dism* 83 NY2d 901, 614 NYS2d 382 [1994]). "The case law makes it clear that where a mortgagee produces the mortgage and unpaid note, together with evidence of the mortgagors default, the mortgagee demonstrates entitlement to a judgment of foreclosure as a matter of law, thereby shifting the burden to the mortgagee to assert and demonstrate, by competent and admissible evidence, any defense that could properly raise a question of fact as to his or her default " (***United Cos. Lending Corp. v Hingos,*** 283 AD2d 764, 765, 724 NYS2d 134 [3rd Dept 2001] (*citations omitted*); *see* ***Marshall v Alaliewie,*** 304 AD2d 1032, 757 NYS2d 162 [3rd Dept 2003]). The counterclaims 219 Sagg Main seeks to interpose contain allegations as to what may or may not have occurred after the commencement of the foreclosure action and, thus, are not relevant to the issue before the Court. As it is determined herein that Smithtown is entitled to summary judgment and having found that 219 Sagg Mains' defenses and counterclaim are devoid of merit, 219 Sagg Main's cross motion for an order to join Bradley E. Rock, Jr., is denied (*see* ***Executive Flightways. Inc. v Caballero*** 52 AD2d 652, 858 NYS2d 913 [2nd Dept 2008]). 219 Sagg Main has not presented any facts that were not available to it at the time it filed its answer. Furthermore, 219 Sagg Main has failed to provide any evidence to support its claim.

The fact that 219 Sagg Main was aware of Smithtown's action in bringing the foreclosure action is not contested herein *(see* ***L.B. Foster Co., v Terry Contracting, Inc.,*** 25 AD2d 721, 268 NYS2d 618 [1st Dept 1966]), as it had engaged in settlement discussions after 219 Sagg Mains' default. The Court did not determine the counterclaims to be inextricably intertwined with Smithtown's foreclosure action, nor did it find that 219 Sagg Main made an evidentiary showing that the proposed counterclaims had merit (*see* ***Butt v New York Medical College***, 7 AD3d 744, 776 NYS2d 897 [2d Dept 2004]). In any event, 219 Sagg Main by its principals, the Ringel's, who were guarantors, waived their right to assert a counterclaim (*see* ***Fleet Bank, Formerly known as Norstar Bank v Petri Mechanical Co., Inc.,*** 244 AD2d 523, 664 NYS2d 462 [2d Dept 1997]). Therefore, 219 Sagg Main's cross motion setting forth the same identical defenses and counterclaim and two additional counterclaims is denied.

219 Sagg Main has failed to show that facts essential to justify opposition to the Smithtown's motion for summary judgment may emerge on further discovery. A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence (*see* ***Bailey v New York City Tr. Auth.,*** 270 AD2d 156, 704 NYS2d 582 [2d Dept 2000]; ***Ruttera & Sons Constr. Co. v Pettocelli Constr.,*** 257 AD2d 614, 684 NYS2d 286 [2d

Dept 1999]; *lv dism* 93 NY2d 956, 684 NYS2d 346 [1999]; ***Auerbach v Bennett,*** 47 NY2d 619, 419 NYS2d 920 [1979]).

In view of the foregoing, Smithtown is entitled to summary judgment in its favor as against 291 Sagg Main, and dismissing the counterclaim (*see* ***Cochran Investment Co. v Jackson,*** 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]; ***Household Finance Realty Corp., of New York v Winn,*** 19 AD2d 545, *supra*; ***Fed Home Loan Mtge. Corp. v Karastathis,*** 237 AD2d 5588, 655 NYS2d 661 [2d Dept 1997]; ***DiNardo v Patcan Serv. Station,*** 288 AD2d 543, 644 NYS2d 779 [2d Dept 1996]; ***Alvarez v Prospect Hosp.,*** 68 NYS 320, *supra*).

Accordingly, the motion for summary judgment and to appoint a referee to compute is granted. The cross motion by 219 Sagg Main to amend it answer and serve a supplemental summons and complaint to add a third-party defendant is denied. Smithtown shall submit a proposed Order of Reference. All matters not decided herein are deemed denied.

Dated: 27 July 2011

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION