[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK Justice

PART 39

AMALGAMATED BANK

- v -

FORT TRYON TOWER

INDEX NO. 101283/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED

DEC 20 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/16/11

BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

----------X

AMALGAMATED BANK, as Trustee of Longview Ultra I Construction Loan Investment Fund (now known as Longview Ultra Construction Loan Investment Fund), individually and as administrative agent for itself and the other Lenders signatory thereto including Petra Mortgage Capital LLC as Co-Lender,

Plaintiff,

-against-

FORT TRYON TOWER SPE LLC, MARSON CONTRACTING CO., INC. ALL ROCK CRUSHING, INC., LIBERTY MECHANICAL CONTRACTORS LLC, TECTONIC ENGINEERING AND SURVEYING CONSULTANTS, P.C., S.J. ELECTRIC, INC., MG ENGINEERING, P.C., RUTHERFORD THOMPSON, THE STATE OF NEW YORK, THE COMMISSIONER OF LABOR OF THE STATE OF NEW YORK, THE NEW YORK STATE DEPARTMENT OF TAXATION, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF FINANCE, THE NEW YORK CITY ENVIRONMENTAL CONTROL BOARD BUREAU, and "JOHN DOE #1 to JOHN DOE #50," both inclusive, the names of the last 50 defendants being fictitious, said defendants' true names being unknown to plaintiff, it being thereby intended to designate holders of judgments and/or liens and/or other interests which affect the mortgaged premises described in the complaint and lessees, tenants, occupants and other persons and entities who may be in possession of portions of the mortgaged premises described in the complaint,

Defendants.

----------X

DECISION/ORDER
Index No. 101283/10
Motions Seq. Nos
001 and 002

BARBARA R. KAPNICK, J.:

This is an action by plaintiff Amalgamated Bank, as Trustee of Longview Ultra I Construction Loan Investment Fund (now known as Longview Ultra Construction Loan Investment Fund), individually and

as administrative agent for itself and the other Lenders signatory thereto including Petra Mortgage Capital Corp. LLC as Co-Lender ("Amalgamated") to foreclose on mortgages securing approximately $95 million in financing made available for the construction of a high-rise condominium development (that is now little more than a hole in the ground) in the Washington Heights neighborhood of Upper Manhattan, and for a deficiency judgment.

Pending before the Court are two motions that are consolidated for decision. Under motion sequence no. 001, plaintiff moves to dismiss the counterclaims and certain affirmative defenses interposed by the borrower, defendant Fort Tryon Tower SPE LLC ("Fort Tryon") and the individual guarantor, defendant Rutherford Thompson ("Thompson", and collectively, the "FTDs"). In addition to opposing the motion, the FTDs cross-move to amend their answer in the form annexed to their motion papers.

Under motion sequence no. 002, plaintiff moves to dismiss the counterclaims and certain affirmative defenses of mechanic's lien holders defendant Marson Contracting Co., Inc. ("Marson") and defendant Tectonic Engineering and Surveying Consultants, P.C. ("Tectonic").

Motion Sequence 001

As alleged in the Complaint dated January 26, 2010, plaintiff is a New York banking corporation that serves as trustee for Longview ULTRA Construction Loan Investment Fund ("Ultra"), formerly known as Longview ULTRA I Construction Loan Investment Fund ("Ultra I" or "Fund"), which itself is the administrative agent for a lender group including itself and Petra Mortgage Capital Corp. LLC ("Petra"). On June 15, 2007, plaintiff, acting as trustee for the Fund (in the Fund's individual capacity and in its capacity as administrative agent for the co-lenders), entered into a Senior Loan Agreement, a Building Loan Agreement and a Project Loan Agreement with Fort Tryon (collectively, the "Loan Agreements").

Pursuant to the Loan Agreements, plaintiff agreed to lend Fort Tryon up to the respective amounts of $21,153,128.45 (the "Senior Loan"), $62,932,719.59 (the "Building Loan") and $10,914,151.96 (the "Project Loan") (collectively, the "Loans") to fund a high-rise condominium development in Washington Heights (the "Project").[1] The Loans are evidenced by a Senior Loan Note, two Building Loan Notes, and two Project Loan Notes (collectively, the "Notes"), and are secured by a Senior Loan Mortgage, a Building

[1] The Project is located on three lots, located at: (i) 33-35 Overlook Terrace; (ii) 730-734 West 184th Street; and (iii) 524 Fort Washington Avenue (the "Property").

Loan Mortgage and a Project Loan Mortgage (collectively, the "Mortgages"). The Mortgages were recorded in the Office of the City Register of the City of New York on June 22, 2007 (with respect to two of the lots), and on July 3, 2008 (with respect to the third lot). The Loan Agreements were individually guaranteed by Fort Tryon's vice president and sole managing director, Thompson, under a Guaranty of Payment and a Guaranty of Completion (the "Guaranties").

Construction on the Project began in 2007. Prior to August 2008, plaintiff approved monthly draw requests by the FTDs as contemplated under the Loan Agreements. On June 30, 2009, the FTDs allegedly failed to make their required maturity date payments and thereby defaulted on the Loan Agreements. Plaintiff provided written notice of default to the FTDs on August 19, 2009.

On or about January 10, 2010, plaintiff brought the instant action to recover by mortgage foreclosure and sale the amounts owed to it pursuant to the Loan Agreements (first cause of action) and to enforce Thompson's obligations under the Guaranties (second cause of action).

In their answer, the FTDs asserted 26 affirmative defenses and four counterclaims, including: failure to state a cause of action

(first), lack of standing (second and third), failure to join all necessary parties (fourth), Fort Tryon does not owe the amounts alleged (fifth), interest is usurious (sixth), lender is not licensed to do business in New York (seventh), Fort Tryon was improperly denied its right to extend the terms of the Loans (eighth), laches (ninth), unclean hands (tenth), plaintiff caused defendants' default (eleventh), notice of pendency expired (twelfth), waiver (thirteenth - on behalf of Thompson), estoppel (fourteenth - on behalf of Thompson), fraudulent inducement (fifteenth - on behalf of Thompson), relief is precluded by election of remedies (sixteenth - on behalf of Thompson), estoppel (seventeenth), breach of contract (eighteenth), fraudulent inducement (nineteenth), waiver and estoppel (twentieth), breach of the obligation of good faith and fair dealing (twenty-first), unconscionability (twenty-second); breach of contract (twenty-third affirmative defense and first counterclaim), breach of fiduciary duty (twenty-fourth affirmative defense and second counterclaim), fraud (twenty-fifth affirmative defense and third counterclaim), and breach of the obligation of good faith and fair dealing (twenty sixth affirmative defense and fourth counterclaim).

On this motion, plaintiff moves, pursuant to CPLR 3211(a)(1), (a)(7) and (b) to: (i) dismiss the counterclaims asserted by the FTDs for failure to state a cause of action, and (ii) to dismiss

the FTDs' second through fourth, sixth through eleventh, and fourteenth through twenty-sixth affirmative defenses on the grounds that they do not state a defense and/or do not have merit.[2]

The FTDs have cross-moved for leave pursuant to CPLR 3025 (b), to serve an Amended Answer and Counterclaims in the form annexed as Exhibit A to their Notice of Cross-Motion, dated December 10, 2010. The primary change is the addition of three more affirmative defenses and counterclaims against plaintiff for declaratory relief (twenty-seventh affirmative defense and fifth counterclaim), specific performance (twenty-eighth affirmative defense and sixth counterclaim) and damages for repudiation and anticipatory breach of the Building Loan and Project Loan Agreements (twenty-ninth affirmative defense and seventh counterclaim). In addition, the FTDs have withdrawn their sixth affirmative defense (usury). The proposed Amended Answer also contains new allegations relating to: (i) the standing of plaintiff to bring this action, and (ii) plaintiff's purported control and dominance over Fort Tryon.

---

[2] Plaintiff has not moved to dismiss the first (failure to state a cause of action), the fifth (amount not owed), and twelfth (notice of pendency expired) affirmative defenses. No argument for dismissal of the thirteenth (waiver of guarantee) affirmative defense is given by plaintiff. However, a chart on the second page of plaintiff's memorandum of law indicates that it seeks dismissal of the thirteenth affirmative defense, as well. Therefore, this Court will consider whether any of plaintiff's arguments for dismissal of other defenses requires dismissal of this defense.

[* 8]

More specifically, the Amended Answer alleges that prior to entering into the Loan Agreements, the predecessor entity of Fort Tryon had a loan agreement with Petra and had given Petra a mortgage on the Property in connection with a loan (Amended Answer, ¶ 23). Because of the amount of financing required to build the Project, plaintiff advised Fort Tryon that it could not finance the entire loan itself, but would need to structure a loan with another lender (*id.* ¶ 25). Discussions then began between Petra and plaintiff in the fall of 2006 that resulted in an Intercreditor Agreement and Servicing Agreement dated June 15, 2007 (the "Intercreditor Agreement") between Petra and plaintiff (the "Lenders") (*id.* ¶ 26). Under the terms of the Intercreditor Agreement, Petra was to fund the first $30 million of the total $95 million loan amount for the construction of the Project. The next $40 million was to be funded equally by the two co-lenders and the last $25 million was to be funded by Amalgamated (*id.* ¶ 27). Pursuant to the Loan Agreements, repayment of the Loans was to occur from the sale of the condominium units, and the loan documents provided a detailed structure for this process (*id.* ¶ 38). The Loans had an initial maturity date of June 30, 2009; however, Fort Tryon had the option of extending the term for two consecutive periods of three months if certain conditions were met.

As a condition of entering into the prior mortgage on the Property, Petra required that Fort Tryon be reorganized as a Single Purpose Entity ("SPE"), limiting its activities to the development of the Property (*id.* ¶ 24). As a further condition to entering into the Loan Agreements, plaintiff required that Fort Tryon enter into an "Amended and Restated Limited Liability Company Agreement of Fort Tryon Tower SPE LLC," dated June 15, 2007 (the "SPE Agreement") (id. ¶ 28). Under its terms, Fort Tryon agreed that it would not engage in any other business other than the construction of the Project on the Property; it would not own any other assets other than the Property; it would not commingle its assets with those of any other person; it would not assume any other debts or obtain credit from any other source; and it would not add any other members as owners (*id.* ¶¶ 29, 30, 31, 33, 34).

In addition, under the terms of the Loan Agreements, every aspect of the construction was allegedly under the control and approval of plaintiff. Detailed plans and specifications were incorporated into the loan documents and could not be changed without plaintiff's approval (*id.* ¶ 42). The Building Loan incorporated a detailed line item Building Loan Budget to be advanced by plaintiff under the Building Loan Agreement (*id.* ¶ 43). All contractors had to be approved by plaintiff. All contracts had to be approved by plaintiff and each building loan advance had to

be specifically approved by plaintiff based upon a site visit by plaintiff's construction consultant. The distribution for the funds from each advance was directed by plaintiff (*id.* ¶¶ 44, 46). As a consequence, the FTDs allege that plaintiff had complete domination and control over Fort Tryon; limiting all of its activities to the Project, limiting all of its funds to the loan advances and controlling the distribution of the advanced loan funds (*id.* ¶¶ 44, 48).

Plaintiff approved the first advance in July 2007 and continued to approve advances through August 2008 (*id.* ¶ 49). Thereafter, plaintiff refused to approve any further advances (id. ¶ 51). In total, plaintiff advanced less than $11.5 million of the roughly $75 million approved under the Building Loan and Project Loan Agreements[3] (*id.* ¶ 53).

According to the FTDs, beginning September 2008 (about 11 months before the initial maturity date of the Loans), plaintiff refused to make any further advances for construction of the Project (*id.* ¶ 51). Plaintiff did, however, approve advances for interest payments to Petra and itself (*id.* ¶ 52). Also in September 2008, plaintiff requested that Fort Tryon suspend construction on

[3] Apparently, the amounts lent under the Senior Loan Agreement were used primarily to pay off the pre-existing mortgage held by Petra in the amount of $16 million.

the Project, purportedly as a result of the financial crisis (*id.* ¶ 63). Plaintiff and Petra assured Fort Tryon that payment would resume once the financial markets stabilized and that the Loans would be extended for the same length of time that construction and payments were suspended (*id.* ¶ 66). Plaintiff and Petra also assured Thompson that if he would direct Fort Tryon to suspend construction, the personal guarantees that he signed on the Loans would not be enforced. It is undisputed that this new understanding between plaintiff and the FTDs was not committed to writing.

Still, in reliance upon the alleged promises of the Lenders, Fort Tryon suspended construction activities on the Project. Despite Fort Tryon's repeated requests for additional funding, plaintiff consistently refused to approve any more loan advances. Instead, plaintiff repeatedly promised Fort Tryon and Thompson that it would resume advances after the financial markets stabilized. It even requested that Thompson prepare a market study as to when market conditions would be favorable for resumption of construction. Thompson prepared and delivered such a report in the spring of 2009, but plaintiff still refused to resume financing (*id.* ¶ 74). Plaintiff's refusal continued until past the initial maturity date of June 30, 2009.

Prior to June 30, 2009, plaintiff did not give any notice to Fort Tryon that it was in default of any obligation under the Loan Agreements (*id.* ¶¶ 76, 77). According to the FTDs, Fort Tryon was not in default of any provision of the Loan Agreements at the time when plaintiff refused to make any further advances. As further alleged by the FTDs, plaintiff's refusal, without cause, to approve advances after August 2008, was the reason the Project was not constructed by the initial maturity date.

Discussion

In considering a motion to dismiss counterclaims and affirmative defenses pursuant to CPLR 3211, the Court generally presumes that the facts pleaded are true, makes all possible inferences in favor of the pleading party, and "determine[s] only whether the facts as alleged fit within any cognizable legal theory" *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); *Leder v Spiegel*, 31 AD3d 266, 267 (1st Dept 2006), *affd* 9 NY3d 836 (2007) (applying the same standard to motions to dismiss counterclaims); *Courthouse Corporate Ctr. LLC v Schulman*, 74 AD3d 725, 727 (2d Dept 2010) (applying the same standard to dismiss affirmative defenses under CPLR 3211 [b]).

However, dismissal is appropriate where the facts alleged are insufficient to make out "any cognizable legal theory" *Breytman v*

Olinville Realty, LLC, 54 AD3d 703, 704 (2d Dept 2008), *lv dism* 12 NY3d 878 (2009), or where the claims are duplicative, *Rock City Sound, Inc. v Bashian & Farber, LLP*, 74 AD3d 1168, 1171-72 (2d Dept 2010), *lv dism* 16 NY3d 825 (2011). Where a party pleads factual allegations that are unequivocally contradicted by documentary evidence, those pleadings are not entitled to such generous interpretation and claims based thereon are properly dismissed, *Leder v Spiegel*, *supra* at 267. As such, a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" CPLR 3211 (b).

Leave to amend and supplement pleadings should be freely given upon such terms as may be just, as a matter of discretion, and in the absence of prejudice or surprise, CPLR 3025 (b). Leave, however, may not be granted where the amended pleading fails to state a cause of action and thus lacks merit *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 (1st Dept 1990).

First Counterclaim and Twenty Third-Affirmative Defense (breach of contract),
Eighteenth Affirmative Defense (breach of contract):

The FTDs' counterclaim and affirmative defenses for breach of contract are based on plaintiff's purported violations of its obligations under the Loan Agreements, and, in particular, plaintiff's failure to continue funding the Loans by failing to

advance the amounts necessary to complete construction of the Project.

As an initial matter, since Thompson was not a party to the Loan Agreements, he cannot assert counterclaims or defenses based on those agreements, *see LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 109 (1st Dept 2001).

With respect to Fort Tryon, plaintiff contends that it waived its right under the Loan Agreements to assert counterclaims and defenses. Specifically, Fort Tryon agreed to the express terms of Section 10.19 of the Loan Agreements which extinguishes any possible counterclaim by Fort Tryon with respect to any breach of the Loan Agreements by plaintiff:

> *Borrower hereby waives the right to assert a counterclaim*, other than a compulsory counterclaim, *in any action or proceeding brought against it by Agent or Lenders* or their agents or otherwise to offset any obligations to make the payments required by the Loan Documents. *No failure by Agent or Lenders to perform any of its obligations hereunder shall be a valid defense* to, or result in any offset against, any payments which Borrower is obligated to make under any of the Loan Documents (emphasis supplied).

Accordingly, Fort Tryon has waived its right to assert counterclaims or affirmative defenses based on plaintiff's alleged

breach of the Loan Agreements, *see Parasram v DeCambre*, 247 AD2d 283, 284 (1st Dept 1998) (defendant mortgagor's "affirmative defenses and counterclaims were properly rejected on the basis of his waiver in the mortgage of the right to interpose in a foreclosure proceeding any defense, setoff or counterclaim").

Moreover, pursuant to Section 10.12 of the Loan Agreements, Fort Tryon agreed to limit its legal recourse for any unreasonable acts or delay a separate action for declaratory or injunctive relief:

> In the event that a claim . . . is made that Agent or any Lender or its agents have acted unreasonably or unreasonably delayed acting in any case where, by law or under this Agreement or the other Loan Documents, Agent or such Lender or such agent, as the case may be, has an obligation to act reasonably and promptly, *neither Agent nor such Lender nor its agents shall be liable for any monetary damages* and *Borrower's sole remedy shall be limited to commencing an action seeking injunctive relief or declaratory judgment*. Any action or proceeding to determine whether Agent or a Lender has acted reasonably shall be determined by an action seeking declaratory judgment ... (emphasis supplied).

In sum, Sections 10.19 and 10.12 of the Loan Agreements bar Fort Tryon's counterclaim and affirmative defenses for breach of the Loan Agreements.

Second Counterclaim and Twenty-Fourth Affirmative Defense (breach of fiduciary duty):

These claims are premised on a theory that plaintiff's purportedly self-interested decision to cease funding monthly advances was a breach of its fiduciary obligations to Fort Tryon (Amended Answer, ¶ 187). In making this claim, the FTDs allege that, as a result of undue control and influence that plaintiff exerted over them, plaintiff owed fiduciary duties to Fort Tryon. This assertion is based on: (i) allegations that Fort Tryon was required, as a condition of the Loans, to reorganize as an SPE and enter into the SPE Agreement which, among other things, prevented Fort Tryon from seeking financing from any source other than plaintiff, and (ii) allegations that the Loan Agreements provided for plaintiff to exercise consents and approvals relating to the disbursements of the monthly advances and the Project's progress toward completion.

Normally, "[t]he legal relationship between a borrower and a bank is a contractual one of debtor and creditor and does not create a fiduciary relationship between the bank and its borrower or its guarantors," *Bank Leumi Trust Co. of N.Y. v Block 3102 Corp.*, 180 AD2d 588, 589 (1st Dept 1992), *lv den* 80 NY2d 754 (1992). In the instant case, plaintiff's bargained-for exercise of contractual rights to protect its collateral on a $95 million construction loan (which the FTDs do not dispute was negotiated at

arms' length) does not indicate control sufficient to impose fiduciary duties from plaintiff to Fort Tryon, separate and apart from contractual duties arising from the Loan Agreements, *Banque Nationale de Paris v 1567 Broadway Ownership Assoc.*, 214 AD2d 359, 360 (1st Dept 1995) (holding that "(t)here is no fiduciary duty . . . arising out of the contractual arm's length debtor and creditor legal relationship between a borrower and a bank ...").

Equally without merit is the contention that the supposedly improper constraints imposed by the SPE Agreement created a fiduciary relationship. The allegation that plaintiff "demanded" that the owners of Fort Tryon enter into the SPE Agreement as a condition of making the Loans (Amended Answer, ¶ 28), does not obscure the fact that the principals of Fort Tryon were acting on their own volition and for their own self interest when they agreed to the restrictions set forth in the SPE Agreement.

Indeed, there is nothing in the Amended Answer that indicates that there was anything other than a fair and equitable bargaining position between plaintiff and the FTDs at the time of execution. Simply because the FTDs are now unhappy with their agreement cannot be a basis to recover from plaintiff, *see Lagarenne v Ingber*, 273 AD2d 735, 738 (3rd Dept 2000) (no relief from duty to perform a contract "merely because it is a burdensome bargain"). The Court

also takes judicial notice, as it may, *see Pearis v Goldschmidt*, 37 AD2d 1001, 1002 (3d Dept 1971) ("The general course of business in a community, including the universal practice of banks . . ., is a matter of which the court may take judicial notice"), that single (or special) purpose entities, carrying the same restrictions that the FTDs now complain of, are commonly used in connection with secured loan transactions and mortgage securitizations to insulate an asset from the potential insolvency of a borrower or related party, *see e.g. Mass Op LLC v Principal Life Ins. Co.*, 2009 WL 2142713 at FN2 (Sup Ct, Nassau Co 2009).[4]

Accordingly, any claims or defenses that depend upon the existence of a fiduciary relationship between plaintiff and Fort Tryon cannot be maintained and are dismissed.

Third Counterclaim and Twenty-Fifth Affirmative Defense (fraud), Fifteenth and Nineteenth Affirmative Defenses (fraudulent inducement):

In their third counterclaim, the FTDs allege that "[a]s a result of the fraudulent acts of Plaintiff as alleged above, Ft. Tryon has been damaged in an amount . . . [no] less than Fifty Million Dollars" (Amended Complaint, ¶ 192). For the purposes of

[4] The only authority relied on by the FTDs that involves a borrower and lender, *K.M.C. Co., Inc. v Irving Trust Co.*, 757 F2d 752 (6th Cir 1985), is outside of this jurisdiction and, as plaintiff correctly observes, has been widely criticized and limited to its facts.

assessing the sufficiency of this counterclaim, the Court assumes that the "fraudulent acts of Plaintiff as alleged above," refers to the allegations of fraudulent inducement contained in the fifteenth and nineteenth affirmative defenses.

The fifteenth affirmative defense asserted by Thompson alleges that he was fraudulently induced to enter into personal guaranties by plaintiff's representations that the lenders it represented had the financial means to fund the Loan Agreements, and that at the time these representations were made, plaintiff knew that the lenders it represented did not have the financial ability to fund the full amount of the Loans and had no intention of doing so (*id.* ¶¶ 122-24).

The nineteenth affirmative defense alleges that plaintiff fraudulently induced Fort Tryon to reorganize as an SPE and enter into the Loan Agreements. As does Thompson, the FTDs allege that plaintiff knowingly misrepresented that the lenders had the funds necessary to complete the Project in order to induce Fort Tryon to agree to the Mortgages so that, after plaintiff stopped making advances, it could foreclose on the Property after the initial maturity date expired. In addition, the FTDs allege that plaintiff fraudulently induced them to suspend construction with promises that construction would resume when the financial markets

stabilized. According to the FTDs, at the time plaintiff made these promises, it had already determined that it would not provide any further advances, yet did so so that it could subsequently claim default and gain title to the Property through a foreclosure sale (*id.* ¶¶ 148-55).

When a claim for fraud arises from the same set of facts alleged to constitute a breach of contract, the claim cannot be maintained unless it alleges conduct distinct from the contractual requirements, *see Crowley Mar. Assocs. v Nyconn Assocs,* 292 AD2d 334 (2d Dept 2002). Therefore, to plead a claim for fraud that is not duplicative of a breach of contract claim, the allegedly false representation or omission must be "collateral or extraneous to the terms of the agreement" (*id.*) such that a duty independent of the contract is alleged to be breached, *Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 118 (1st Dept 1998) ("As a general rule, to recover damages for tort in a contract matter, it is necessary that the plaintiff plead and prove 'a breach of duty distinct from, or in addition to, the breach of contract'") (citation omitted). Consequently, a fraud claim that merely alleges that a defendant did not intend to fulfill its obligations under an agreement, even when accompanied by an allegation that the representation was made with an intent to deceive, will not survive

dismissal, *see Tesoro Petroleum Corp. v Holborn Oil Co.*, 108 AD2d 607 (1st Dept 1985), app dism 65 NY2d 637 (1985).

Here, the claims of fraudulent inducement rest, at bottom, on allegations that plaintiff could not, and did not intend to, perform the Loan Agreements. As such, they cannot be fairly characterized as collateral or extraneous to the Loan Agreements. Given the Court's determination that no fiduciary relationship exists between Fort Tryon and plaintiff (*supra*), the fraud claims and defenses are duplicative of the FTDs' breach of contract claim, and are, therefore, dismissed.[5]

---

[5] Additional evidence of the redundancy of the fraud claim and defenses is to be found in the identical amount, $50 million, that both counterclaims allege as damages. Further, in describing their damages in their breach of contract counterclaim, the FTDs assert that Fort Tryon "suffered economic damage, including but not limited to the loss of profit on the Project and a loss of creditworthiness" (Amended Answer ¶¶ 182-183). Because the FTDs do not specify the basis of their damages in their fraud claims, the Court is left to assume that they are attributable to the same causes as those pled in their contract claims. However, in a fraud action, "[t]he true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong or what is known as the out-of-pocket rule", *Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 421 (1996) (inner quotation marks and citation omitted). Under this rule, "[d]amages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained" (*id.*). Here, other than the loss of their bargain, *i.e.*, lost profits, the FTDs do not allege damages of the type recoverable in a fraud claim, and this is an additional ground on which to dismiss this claim.

Fourth Counterclaim and Twenty-Sixth Affirmative Defense; Twenty-First Affirmative Defense (good faith and fair dealing):

In their fourth counterclaim, the FTDs allege that: (i) plaintiff had an obligation under the Loan Agreements to loan Fort Tryon more than $73 million for the Project, (ii) plaintiff determined with "malicious intent" to cease funding the advances required to complete construction, and (iii) plaintiff did so with the knowledge that, without this funding, Fort Tryon would be unable to complete the Project and repay the Loans (Amended Answer, ¶¶ 194-196).

> Within every contract is an implied covenant of good faith and fair dealing. This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement.

Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce, 265 AD2d 513, 513-514 (2d Dept 1999) (citations omitted). A good faith claim is redundant if it merely pleads that defendant did not act in good faith in performing its contractual obligations, *see Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 (1st Dept 2010), *lv den* 15 NY3d 704 (2010), (dismissing a good faith and fair dealing claim because it arose from the same facts as the breach of contract claim and sought the identical damages).

Here, the breach of good faith claim does little more than allege what is already asserted in the breach of contract claim, namely, that plaintiff breached its obligations under the Loan Agreements to fully fund the Loans (barring any default by the FTDs). Thus, this claim does not provide a separate cause of action from the FTDs' breach of contract claim and is dismissed as duplicative.

Fifth (declaratory judgment), Sixth (specific performance) and Seventh (repudiation and anticipatory breach) Counterclaims:

In their proposed fifth counterclaim (and twenty-seventh affirmative defense), the FTDs seek a declaration that: (i) plaintiff's claim that the term of the Loans has expired, is without merit, (ii) Fort Tryon is not in default of its obligations under the Loan Agreements, and (iii) plaintiff is obligated to approve and disburse constructive advances for the balance of the loan proceeds (Amended Answer, ¶ 206).

In their proposed sixth counterclaim (and twenty-eighth affirmative defense), the FTDs seek a decree of specific performance, "compelling Plaintiff to provide funding for the remaining balance of the Building Loan and Project Loan amounts, consistent with the terms of the loans" (*id.* ¶ 212).

In their proposed seventh counterclaim (and twenty-ninth affirmative defense), the FTDs allege that by failing and refusing to fund draw requests since August 2008, plaintiff has repudiated and anticipatorily breached the Building Loan and the Project Loan Agreements, and consequently, that Fort Tryon "is entitled to damages . . . [of no] less than Fifty Million Dollars" (*id.* ¶¶ 214-216).

The FTDs claim legal entitlement to bring these additional counterclaims on the strength of plaintiff's recognition that the Loan Agreements specifically permit "an action seeking injunctive relief or declaratory judgment," (plaintiff's moving memorandum of law, at 6) (citing § 10.12 of the Loan Agreements). The FTDs also assert that as borrowers on a construction loan, they are entitled to bring an action for specific performance, *see Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 221 (4th Dept 2009), *lv to appeal dism* 85 AD3d 1656 (4th Dep't 2011); *see also Bregman v Meehan*, 125 Misc 2d 332, 346-47 (Sup Ct, Nassau Co 1984).

Factual support for these counterclaims rests on the FTDs' allegations that, at all relevant times, Fort Tryon was in compliance with the requirements of the Loan Agreements, and that plaintiff unjustifiably refused to continue making loan advances to

cover necessary expenses to enable the Project to be built (Amended Answer, ¶¶ 49-58, 76-77, 109, 138-143, 173-183, 200-206).

In response, plaintiff, relying on documentary evidence, asserts that Fort Tryon was in default of its obligations when plaintiff ceased making advances. Specifically, a subcontractor on the Project, defendant All Rock Crushing, Inc. ("All Rock"), filed a mechanic's lien dated July 31, 2008 against the Property. Upon the recording of All Rock's lien, various provisions in Article 2 of the Building Loan and Project Loan Agreements provided that plaintiff no longer had an obligation to make advances for the Project, because Fort Tryon, by not keeping the Property free and clear of liens, failed to fulfill a condition precedent for continued funding, *see e.g.*, Building Loan Agreement, Sections 2.9.2 (c) & (e), 2.7. More specifically, Fort Tryon had agreed in Section 4.2.2 of the Building Loan Agreement (incorporated by reference into Section 4.2.2 of the Project Loan Agreement), that it would not "create, incur, assume or suffer to exist any Lien on any portion of the Property except for Permitted Encumbrances." Thus, according to plaintiff, documentary evidence in the form of All Rock's publicly-filed notice of lien and the aforementioned contractual provisions, not only refutes the FTDs' claim that Fort Tryon fully complied with all of its obligations and was never in default of the Loan Agreements before plaintiff

ceased making advances, but affirmatively demonstrates that plaintiff was contractually relieved of its obligation to make any further advances after August 1, 2008.[6]

The FTDs have a different view of what effect, if any, the filing of All Rock's lien had on plaintiff's alleged obligation to continue funding construction expenses. Subsequent to filing its lien, All Rock served a Complaint in May 2009 to foreclose, naming plaintiff here as one of the defendants there (*see* Index No. 100618/2009). On December 26, 2009, more than a month before Amalgamated commenced the instant action, it interposed a Verified Answer with Counterclaims and Cross-Claims to All Rock's Complaint, alleging that the All Rock lien was not properly served, that All Rock "willfully exaggerated" the amount of the lien, that the lien is precluded by lien waivers, and was not approved by plaintiff, and that it was the "product or end result of a pattern or scheme of fraud and deceit" and should be declared "null and void" ((Amalgamated's Verified Answer in Index No. *100618/2009,* ¶¶ 17, 24, 26, 29 and 33). Significantly, Amalgamated also seeks therein injunctive relief to restrain and prohibit Marson (Fort Tryon's construction manager) and Fort Tryon

---

[6] The FTDs' argument that they received no notice of this default from plaintiff is of no moment. The Loan Agreements provide that plaintiff may take any action to enforce its rights "without notice or demand" upon an event of default, *see* Building Loan and Project Loan Agreements § 9.1 (b).

from paying the All Rock lien (*id.*, ¶¶ 13, 27, 33, 36, 38). Having claimed in a prior proceeding that the All Rock lien was "invalid" and "null and void," plaintiff cannot now claim that Fort Tryon's failure to pay or failure to prevent the existence of what plaintiff itself alleges to be a fraudulent lien, constitutes a default under the Loan Agreements.

Thus, assuming the truth of the allegations in the Amended Answer, the FTDs appear to have at least stated a cause of action for declaratory judgment and specific performance in their fifth and sixth counterclaims and the Answer may be amended accordingly.

However, the FTDs cannot assert their proposed seventh counterclaim. That claim, although identified initially as one for injunctive relief, is nothing more than a re-pled - and disallowed - breach of contract claim. Indeed, on reply, the FTDs describe this claim as one for "contract repudiation", which, in fact, it is. Accordingly, the seventh counterclaim does not state a claim and cannot be asserted.

Second and Third (standing) and Seventh (unlicensed lender) Affirmative Defenses:

The Amended Answer's second and third affirmative defenses raise valid defenses challenging plaintiff's standing and authority to bring this action. First, the FTDs correctly observe that the

plaintiff in this action is "Amalgamated Bank, as Trustee of Longview Ultra I Construction Loan Investment Fund (now known as Longview Ultra Construction Loan Investment Fund), individually and as administrative agent for itself and the other Lenders signatory thereto including Petra Mortgage Capital Corp. LLC as Co-Lender," whereas the name of the holder of the Mortgages is "Amalgamated Bank, as Trustee of Longview Ultra I Construction Loan Investment Fund" (*see* Exs. G, H and I to the Complaint). Although plaintiff claims that the "change in the name of the loan fund" from Ultra I to Ultra is "unremarkable" (plaintiff's reply memorandum of law, at 20), the Complaint contains no allegation that the discrepancy is attributable to a change in the name of the fund as opposed to, for example, a merger or assignment, which might possibly have involved a transfer of the Mortgages and Notes.

In addition, in a related case also now pending before this Court, Amalgamated's co-lender, Petra, filed a Complaint in October 2010, alleging that it assigned its interests in the Mortgages to a Cayman Islands entity known as Petra CRE CDO 2007-1, Ltd..[7] However, it is not clear whether Petra assigned its interests in the Loans before or after the commencement of this action.

---

[7] *See, Petra Mortgage Capital Corp. LLC and Petra CRE CDO 2007-1, Ltd. against Amalgamated Bank, as Trustee of Longview Ultra 1 Construction Loan Investment Fund* (Index No. 651861/2010).

[* 29]

Accordingly, the second and third affirmative defenses will not be dismissed at this stage of litigation.

The seventh affirmative defense is based on the FTD's allegation that "one or more of the Lenders for whom Plaintiff purports to be a Trustee or administrative agent is not licensed to do business in the State of New York" (Amended Answer, ¶ 98). More specifically, the FTDs contend that the Complaint does not allege that either Ultra or the Cayman Islands entity are licensed to conduct business in New York, or if either falls under the "foreign bank" exemption of Banking Law 200.

In this regard, Section 200 of the Banking Law prohibits a foreign banking corporation from transacting business in this State unless certain requirements are met. While plaintiff has not pleaded any of these requirements, section 200 does provide in relevant part:

> This section shall not be construed to prohibit foreign banking corporations which do not maintain an office in this state for the transaction of business from (1) making loans in this state secured by mortgages on real property . . . [or]; (2) enforcing in this state obligations heretofore or hereafter acquired by it . . . in the transaction of any business authorized by this section ...

Thus, even if the Lenders plaintiff represents are unlicensed to transact business in New York, plaintiff can, pursuant to Section 200 of the Banking Law, maintain this action to enforce the obligation created by the Mortgages, *see First Wis. Trust Co. v Hakimian*, 237 AD2d 249, 250 (2d Dept 1997) (plaintiff as a "foreign bank which is not licensed in New York State" .... was, nonetheless, "authorized to commence this mortgage foreclosure action [under] Banking Law section 200 [which] authorizes foreign banks to loan money secured by mortgages on property in this State and to commence actions to enforce obligations under those mortgages"). Accordingly, the seventh affirmative defense lacks merit and is dismissed.

Fourth Affirmative Defense (failure to join necessary parties):

In their fourth affirmative defense, the FTDs allege that, pursuant to New York Real Property Actions and Procedures Law ("RPAPL") 1311, plaintiff failed to join all necessary parties to the action, identifying only the Fort Tryon Jewish Center (an adjoining property owner and the grantor of various easements to the Project) as an unnamed necessary party (Amended Answer, ¶¶ 19-20, 92-93).[8] However, this allegation cannot be the basis of a

[8] RPAPL 1311 (1) and (3) define necessary parties to a foreclosure action as "[e]very person having an estate or interest in possession, or otherwise, in the property" and

valid defense because "[n]either RPAPL 1311, which governs foreclosure actions, nor CPLR article 10 and 3211 (a) (10), which govern civil actions generally, requires dismissal of an action in all cases in which there has been a failure to join a necessary party" (*Dime Sav. Bank of N.Y. v Johneas*, 172 AD2d 1082, 1083 [4th Dept 1991]). Further, any omitted parties' rights would remain unaffected by the foreclosure judgment and sale and the Court could always order the necessary parties joined to the action at the appropriate time (*see Board of Mgrs. of Parkchester N. Condominium v Alaska Seaboard Partners Ltd. Partnership*, 37 AD3d 332, 333 [1st Dept 2007]). In any event, the FTDs provide no authority for the proposition that Fort Tryon Jewish Center, as the grantor of an easement, is a necessary party as contemplated by RPAPL 1311. Accordingly, this defense lacks merit and is dismissed.

Eighth Affirmative Defense (borrower denied right to extend term of the Loans):

Under this defense, the FTDs allege that plaintiff's actions denied Fort Tryon the "right, opportunity and ability" to exercise its option under the Loan Agreements to extend the term of the Loans (Amended Answer, ¶¶ 100, 102). The FTDs further allege that the right to exercise the option to extend was not discretionary

---

"[e]very person having any lien or incumbrance upon the real property which is claimed to be subject and subordinate to the lien of the plaintiff ."

with the Lenders (*id.* ¶ 101). However, Section 2.1.5 of the Loan Agreements expressly predicates any extension of the Loans upon a number of conditions the FTDs do not claim to have satisfied, including that the extension is "acceptable to any permanent lender." Thus, the FTDs did not have an unlimited right to extend the Loans, and plaintiff bargained for, and was entitled to exercise its right not to extend the Loans. To argue, as do the FTDs, that they have sufficiently pled allegations that plaintiff's actions prevented defendants from even reaching the point where they *might* have been able to supply evidence that the extension was satisfactory to a permanent lender, only demonstrates the degree to which the supporting allegations are improperly speculative and too attenuated to state a valid defense. Accordingly, the eighth affirmative defense is dismissed.

Ninth Affirmative Defense (laches):

"[T]he doctrine of laches is not available in a foreclosure action brought within the period of limitations", *New York State Mtge. Loan Enforcement & Admin. Corp. v North Town Phase II Houses*, 191 AD2d 151, 152 (1st Dept 1993) (citation omitted). Here, the Loan Agreements between plaintiff and Fort Tryon matured on June 30, 2009. Plaintiff filed the Complaint on January 29, 2010, well within the six years allowed for an action for foreclosure of a

[* 33]

mortgage on real property (CPLR 213). Accordingly, the ninth affirmative defense is dismissed.

Tenth Affirmative Defense (unclean hands):

> Unclean hands in participating in a course of conduct of deception and deceit is an effective bar to [an action]... The doctrine of unclean hands applies when the complaining party shows that the offending party is guilty of immoral, unconscionable conduct ... [A]ny willful conduct which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean as long as the conduct pertains to the matter in litigation ... (internal citations and quotation marks omitted).

In re State Urban Development Corporation, 26 Misc3d 1228(A) at *28 (Sup Ct, Kings Co 2010).

Here, the Amended Answer alleges that plaintiff refused, without cause, to provide advances to the Project after August 2008, that plaintiff's actions were the sole cause of Fort Tryon's inability to repay the loan and that Fort Tryon suspended construction, relying upon plaintiff's promise to resume loan advances. According the FTD every favorable inference, they have, at this stage, adequately pled facts to support their defense of unclean hands.

Eleventh Affirmative Defense (plaintiff caused defendants' default):

In this defense, the FTDs assert that plaintiff is not entitled to foreclosure because the alleged default was caused entirely by plaintiff's own acts (Amended Answer, ¶¶ 109-110). It has long been established that "[a] promisee who prevents the promisor from being able to perform the promise can not maintain suit for nonperformance; he discharges the promisor from duty," *Canterbury Realty & Equip. Corp. v Poughkeepsie Sav. Bank*, 135 AD2d 102, 107 (3d Dept 1988) (quotation marks and citation omitted). In the instant case, the FTDs allege that plaintiff's bad faith action in cutting off advances for the Project's construction in furtherance of its own financial interest, even though Fort Tryon was not in default of any of its obligations under the Loan Agreements, was the sole cause of the inability of Fort Tryon to pay the loan off on the initial maturity date (*id.* ¶ 109). Accordingly, this affirmative defense will not be dismissed.

Fourteenth Affirmative Defense (estoppel); Thirteenth Affirmative Defense (waiver):

The fourteenth affirmative defense, asserted on behalf of Thompson, raises a defense of estoppel against enforcement of the Guaranties. The elements of promissory estoppel are: "a clear and unambiguous promise, reasonable and foreseeable reliance by the

party to whom the promise is made, and an injury sustained in reliance on that promise," *Williams v Eason*, 49 AD3d 866, 868 (2d Dept 2008). However, even if Thompson alleged all of the necessary elements of estoppel, this defense cannot be maintained in the face of documentary evidence that establishes that Thompson and Fort Tryon agreed in the Guaranty of Payment and the Guaranty of Completion that any subsequent promises would have no effect on their obligations under the Guaranties. In particular, Section 6.11 of each Guaranty provides in relevant part:

> THIS GUARANTY IS INTENDED BY GUARANTOR, AGENT AND LENDER AS A FINAL AND COMPLETE EXPRESSION OF THE TERMS OF THE GUARANTY, AND NO COURSE OF DEALING BETWEEN GUARANTOR, AGENT AND LENDER . . . AND NO EVIDENCE OF PRIOR, CONTEMPORANEOUS OR SUBSEQUENT ORAL AGREEMENTS OR DISCUSSIONS OR OTHER EXTRINSIC EVIDENCE OF ANY NATURE SHALL BE USED TO CONTRADICT, VARY, SUPPLEMENT OR MODIFY ANY TERM OF THIS GUARANTY AGREEMENT. THERE ARE NO ORAL AGREEMENTS BETWEEN GUARANTOR, AGENT AND LENDER.

Thus, even if plaintiff made the promise as alleged, that it would extend the loan pending plaintiff's resumption of advances if Thomson would agree to suspend construction on the Project (Amended Answer, ¶ 117), the FTDs nevertheless agreed that such an extrinsic promise would be unenforceable. Moreover, based on this provision, the FTDs' reliance on the promise by plaintiff to waive enforcement of the Guaranties would not have been reasonable. Accordingly, the fourteenth affirmative defense is dismissed.

For the identical reason, the thirteenth affirmative defense, raising the claim of waiver against the enforcement of the Guaranties (*id.* ¶¶ 113-15), must also be dismissed. In addition, that portion of the twentieth affirmative defense (*infra*), asserting waiver and estoppel as a defense to the enforcement of the Guaranties (*id.* ¶¶ 165-66), is likewise dismissed.

Sixteenth Affirmative Defense (relief is precluded by election of remedies):

Relying on the doctrine of election of remedies, as codified in RPAPL 1301 (3), the FTDs maintain that plaintiff's second cause of action for a deficiency judgment, or money damages, is precluded by the relief of foreclosure sought by plaintiff in its first cause of action. A mortgagee may elect between recovering in equity by an action for foreclosure and sale, or by recovering the debt at law, *see Wyoming County Bank & Trust Co. v Kiley*, 75 AD2d 477, 480 (4th Dept 1980). However, the relief sought by plaintiff in its second cause of action in the Complaint is not an alternative to the relief sought by plaintiff in its first cause of action. Rather, it is conditioned on whether a foreclosure sale of the Property satisfies the outstanding debt. Pursuant to RPAPL 1371 (1), if a mortgagee elects to bring an action for foreclosure, the mortgagee can also request a deficiency judgment for any unsatisfied debt against a named defendant who is liable for

payment of the debt secured by the mortgage. Accordingly, this defense lacks merit and is dismissed.

Seventeenth and Twentieth Affirmative Defenses (estoppel and waiver):

In their seventeenth affirmative defense, the FTDs assert that plaintiff should be estopped from claiming that Fort Tryon is in default of its obligations under the Loan Agreements and from foreclosing on the Property. Specifically, the FTDs assert that plaintiff knew that Fort Tryon acted in reliance on the promises made by plaintiff for the funding of the costs of the Project (more than $73 million) when it entered into the Loan Agreements, and knew that without the sale of the condominium units the FTDs would not be able to repay the Loans. They further allege that plaintiff knew that they would reasonably rely upon plaintiff's promise to extend the term of the loan when its made the request for Fort Tryon to suspend construction in September 2008.

The FTDs claim that plaintiff has, in breach of its promises and representations, failed to resume loan advances and refused to extend the terms of the Loan, as a result of which they were unable to complete construction of the Project by the initial maturity date and have been damaged (Amended Answer, ¶¶ 129-143).

The twentieth affirmative defense assserts an additional defense of estoppel and waiver against foreclosure and enforcement of the Guaranties that is based largely on the same allegations supporting the seventeenth affirmative defense. In addition, the FTDs allege that in exchange for Thompson's agreement to suspend construction, plaintiff agreed to negotiate revisions to the Intercreditor Agreement that would result in the resumption of funding to complete the Project and a lowering of the interest rate on the Loans.

With respect to its right to foreclose, plaintiff argues that these defenses, based on alleged oral promises, are in violation of the integration clauses contained in the Loan Agreements that state that no provision of the Loan Agreements may be modified or supplemented except "by an instrument in writing signed by Borrower and [plaintiff]" (Loan Agreements, 11.4 [e]). Undercutting plaintiff's argument, however, the same paragraph goes on to provide that "any provision of this Agreement or the other Loan Documents may be waived by [plaintiff]" (*id.*). Additionally, the FTDs are not alleging a modification to the Loan Agreements as a result of the alleged oral promises. Rather, the FTDs allege that after plaintiff stopped making advances, it induced Fort Tryon to suspend construction through various promises on which Fort Tryon relied, changing its position to its detriment. This is sufficient

to state a defense of waiver and estoppel, *see Nassau Trust Co v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 183 (1982) (distinguishing "between an oral agreement that purports to modify the terms of a prior written agreement and an oral waiver by one party to a written agreement of a right to require of the other party certain performance in compliance with that agreement"). Accordingly, the FTDs have stated valid defenses against foreclosure in their seventeenth and twentieth affirmative defenses.

With respect to enforcement of the Guaranties, this Court has already determined in its discussion of the fourteenth affirmative defense (*supra*) that, based on the express language of the Guaranties, the defenses of estoppel or waiver may not be raised to avoid liability under the Guaranties.

Twenty-Second Affirmative Defense (unconscionability):

In support of this defense, the FTDs allege that plaintiff "engaged in oppressive and unconscionable conduct with regard to the Mortgages," and consequently, plaintiff should not be afforded the right to foreclose (Amended Complaint, ¶¶ 171-72).

In seeking dismissal of this defense, plaintiff argues that with respect to commercial transactions, "courts have rarely found

unconscionability, and it has been held that when businessmen contract in a commercial setting, a presumption of conscionability arises", *Lister Elec. v Incorporated Vil. of Cedarhurst*, 108 AD2d 731, 734 (2d Dept 1985) (internal quotation marks and citations omitted). Granted, the FTDs fail to allege the absence of a meaningful choice in their dealings with plaintiff with respect to contract formation. Nevertheless, the Amended Answer also alleges post-execution conduct by plaintiff, *i.e.*, plaintiff's unjustified refusal to continue advancing funds and plaintiff's unkept promise of continued funding in exchange for Fort Tryon's agreement to suspend construction, that is sufficient to state a defense of unconscionability.

Motion Sequence 002

On this motion, plaintiff seeks dismissal of the four counterclaims and second through thirteenth affirmative defenses interposed by Marson in its Verified Answer, Cross Claim and Counterclaim, as well as dismissal of the first (and only) counterclaim and the first and second affirmative defenses interposed by Tectonic in its Verified Amended Answer, Counterclaim and Cross Claims.[9] Plaintiff's central argument is that these counterclaims and affirmative defenses ultimately fail because they

[9] Plaintiff does not seek dismissal of Marson's first affirmative defense (failure to state a cause of action), or Tectonic's third affirmative defense for the same relief.

do not plead facts sufficient to suggest a reason why the Mortgages should be subordinated to Marson's and Tectonic's mechanic's liens.

According to Marson's Answer, on June 1, 2007, it entered into a written Construction Management Agreement (the "CMA"), with Fort Tryon, under which Marson agreed to act as a construction manager for the Project. Between October 29, 2007 and November 17, 2008, Marson performed work, labor and services and furnished materials in accordance with the CMA, including additional work at the special request of Fort Tryon. Marson alleges that as of November 17, 2008, it is owed a balance in the sum of $1,319,136.76, plus interest. Marson also states that on December 24, 2008, it filed in the New York County Clerk's Office a Private Improvement Mechanic's Lien against the Property, claiming a lien in the sum of $1,258,776.27 as a result of the improvements Marson made to the Property. Marson's mechanic's lien has not yet been paid. Marson acknowledges that "[a]t all times hereinafter mentioned[,] Amalgamated has or held a mortgage lien or an interest against the Property" (Marson Answer, ¶ 54).

According to the Tectonic Answer, on or about March 3, 2006, March 2, 2007, April 30, 2007, November 19, 2007 and January 9, 2008, Tectonic and Fort Tryon entered into three agreements (the "Tectonic Agreements") under which Tectonic would provide

construction inspection and engineering support services to the Project. Pursuant to the Tectonic Agreements, between September 18, 2006 and November 10, 2008, Tectonic furnished engineering services for the improvement of the Property. Tectonic rendered invoices to Fort Tryon, out of which a balance of $134,448.49 remains due and owing. The Tectonic Answer alleges that on May 26, 2009, it duly and timely filed in the office of the Clerk of the County of New York, a Notice Under Mechanic's Lien Law, "asserting and claiming a mechanics' lien" against the Property (Tectonic Answer, ¶ 38). Tectonic's lien has not been paid.

1. Marson's Counterclaims and Affirmative Defenses

First Counterclaim (subordination of the Mortgages):

In its first counterclaim, Marson alleges that its mechanic's lien is entitled to priority over the Mortgages because plaintiff "is not entitled to any mortgage lien priority under Section 22 of the New York State Lien Law," and because "Amalgamated knew, or should have known, that the Project would have not been successful and that Marson would not be paid" (Marson Answer, ¶¶ 93, 95).

The basis for Marson's reference to the Lien Law appears to be its claim that while the Mortgages were properly recorded, the Complaint fails to allege, pursuant to Lien Law 22, that the Building Loan Agreement, including the Senior Loan and Project Loan

Agreements, was "filed in the office of the clerk of the county in which any part of the land is situated" (Lien Law § 22) (*see* Affirmation of Robert Mark Wasko, dated January 5, 2011 ["Wasko Aff."], ¶¶ 3-12). Given this omission, Marson argues that plaintiff's interests in the Property are "subject to the lien and claim of a person who shall thereafter file a notice of lien under this chapter" (Lien Law § 22). Thus, Marson claims that its mechanic's lien has achieved priority over the earlier-recorded Mortgages.

In the ordinary course, properly filed mortgages meeting the statutory requirements are entitled to priority over later-filed mechanic's liens (Lien Law §§ 13, 22). Here, an Affirmation submitted by Marson's own counsel demonstrates plaintiff's compliance with the Lien Law. In particular, and as acknowledged by Marson, the Building Loan Agreement, referencing and cross-referencing the Senior Loan and Project Loan Agreements, was filed in the New York County Clerk's office (*see* Wasko Aff., ¶¶ 4, 10, Ex. E. to Marson's memorandum of law in opposition). Further, there is absolutely nothing in Lien Law § 22 which expressly refers to "[a] building loan contract," that suggests that plaintiff was also obligated to file the Senior Loan and Project Loan Agreements in the clerk's office to maintain its lien superiority on the Property. Consequently, any claim for subordination predicated on

plaintiff's purported failure to file the Building Loan Agreement cannot be maintained in the face of documentary evidence demonstrating the contrary.

In addition, Marson's allegation that plaintiff knew that the Project would not be successful and that Marson would not be paid, also fails as a matter of law. By its own terms, Lien Law § 22 only imposes a duty on plaintiff to disclose the consideration paid for the loan, all related expenses incurred or to be incurred in connection with the loan, and the net sum available to the borrower for the improvement (Lien Law § 22). Contrary to Marson's assertion, "the disclosure contemplated by the Lien Law is not intended to function as a guarantee that a construction project is adequately financed or economically viable," *Howard Sav. Bank v Lefcon Partnership*, 209 AD2d 473, 476 (2d Dept 1994), *lv dism* 86 NY2d 837 (1995). Accordingly, Marson's first counterclaim is dismissed.[10]

Second Counterclaim (reasonable reliance):

In its second counterclaim, Marson alleges that it "reasonably relied upon the construction loan proceeds being used for the statutory trust purposes, in accordance with the strict terms and

[10] The Court is not convinced by the additional arguments contained in Marson's sur-reply letter, dated April 8, 2011 (submitted after oral argument on the motions).

conditions of the loan(s) and with plaintiff properly monitoring the use of said loan funds" (Marson Answer, ¶ 99). Marson also alleges that it was "damaged by its reasonable reliance, upon plaintiff" (*id.* ¶ 100).

As plaintiff correctly observes, reasonable reliance is an element of a claim, and is not, by itself, a legally cognizable theory. Marson fails to make clear under which theory (*e.g.*, fraud, estoppel, negligent misrepresentation) it is claiming reasonable reliance. Still, for reasons that will become readily apparent in the discussion of Marson's unjust enrichment counterclaim, the Court will address the allegations on which this "claim" rests.

Marson contends that, as pleaded in its Answer, it reasonably relied upon the initial funding for the Project of approximately $95 million, as provided in the Loan Agreements. In addition, Marson has submitted Affidavits in opposition to plaintiff's instant motion, asserting (for the first time) that it reasonably relied upon an oral promise made to it by plaintiff's authorized representative, Deborah C. Nisson (a former Senior Vice-President and Portfolio Manager), that Marson would be paid if it continued to work on the Project (*see e.g.* Affidavit of Leon D. Marrano, III

[* 46]

[Marson's President], sworn to on January 7, 2011 [Marrano Aff., ¶ 5 [1]).

As an initial matter, Marson was not entitled to rely on the Loan Agreements. In particular, Section 2.9.5 (No Reliance) of the publicly-filed Building Loan Agreement specifically provides that Marson could not rely on funding under the Loan Agreements:

> All conditions and requirements of this Agreement are for the sole benefit of [plaintiff] and Lenders and *no other Person (including without limitation,* the Construction Consultant, *Construction Manager* and Trade Contractors engaged in the construction of the Improvements) *shall have the right to rely on* the satisfaction of such conditions and requirements by Borrower (emphasis supplied).

The Building Loan and Project Loan Agreements further provide in Section 2.5.5(b):

> ALL POTENTIAL LIENORS ARE HEREBY CAUTIONED TO EXERCISE SOUND BUSINESS JUDGMENT IN THE EXTENSION OF CREDIT TO BORROWER. NO POTENTIAL LIENOR SHOULD EXPECT [PLAINTIFF] TO MAKE ADVANCES OF THE BUILDING [PROJECT] LOAN ON BEHALF OF LENDERS IN AMOUNTS AND AT TIMES SUCH THAT IT WILL NOT BE NECESSARY FOR EACH SUCH POTENTIAL LIENOR TO EXERCISE SOUND BUSINESS JUDGMENT IN THE EXTENSION OF CREDIT TO BORROWER. MOREOVER, ALL POTENTIAL LIENORS ARE REMINDED THAT SUBDIVISION 3 OF SECTION 13 OF THE LIEN LAW OF THE STATE OF NEW YORK PROVIDES THAT 'NOTHING IN THIS SUBDIVISION SHALL BE CONSIDERED AS IMPOSING UPON THE LENDERS ANY OBLIGATION TO SEE TO THE PROPER APPLICATION OF SUCH ADVANCES BY THE OWNER,' AND LENDERS DO NOT IMPOSE SUCH OBLIGATION ON THEMSELVES.

Thus, any reliance by Marson on the "written representations of the plaintiff that the Lenders would advance $95 million dollars to construct the [Project]" (Marson's memorandum of law in opposition, at 8), is unreasonable as a matter of law.

As mentioned, Marson also claims that it reasonably relied on an oral promise made by an agent of plaintiff, that if it continued to work on the Project, Marson would be paid. However, Marson was already on notice, at the outset of the Project, that any reliance by it on an oral promise made to it by plaintiff would be inherently unreasonable. That is because, "to induce Lenders to close the Loans," Marson signed a Consent to Assignment of Construction Manager's Contract, dated June 4, 2007 (the "Consent"). Under the Consent, if Fort Tryon defaulted under the Loan Agreements, plaintiff could elect to exercise Fort Tryon's rights under the CMA. More specifically, if such default were to occur, then, "[a]t the request of [plaintiff], [Marson] shall continue performance in accordance with the terms of the [CMA] on Lenders' behalf ..." (*id.* ¶ 3). Significantly, paragraph 8 of the Consent further provides that "[a]ll notices or other communications required or permitted to be given pursuant to the provisions of this Agreement *shall be in writing* ..." (*id.* ¶ 8 [emphasis supplied]). Thus, Marson was permitted to continue working only "at the request of [plaintiff]," which constitutes a

"communication . . . permitted to be given pursuant to the provisions of the [the] Agreement" and is, therefore, required to "be in writing." (*id.* ¶¶ 3, 8). In short, Marson agreed in the Consent that it could not reasonably rely on any oral promise of payment if it continued working.

Accordingly, Marson's second counterclaim cannot be sustained and is dismissed.

Third Counterclaim (unjust enrichment):

In its third counterclaim, Marson alleges that "as a result of Marson's reasonable reliance, plaintiff was unjustly enriched in that Marson's professional construction management services improved the value of the Property plaintiff claims an interest therein," and that "nonpayment for the value, performed by Marson and embodied in the current condition of the Property would allow the plaintiff to be unjustly enriched" (Marson Answer, ¶¶ 103-104).

To prevail on its claim of unjust enrichment, Marson must show that (1) plaintiff was enriched (2) at Marson's expense, and (3) that equity and good conscience require restitution, *see Clark v Daby*, 300 AD2d 732 (3d Dept 2002), *lv den* 100 NY2d 503 (2003). However, as just established, any reliance by Marson on plaintiff's alleged oral promise was unreasonable as a matter of law, and,

accordingly, this claim is dismissed, *see Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 451-452 (1st Dept 2009), *affd* 16 NY3d 173 (2011) (dismissing plaintiff's unjust enrichment claim on the ground that the plaintiff was not entitled to rely on defendant's representations).

Fourth Counterclaim (unconscionability):

In this counterclaim, Marson alleges that the "course of conduct intentional or otherwise, by plaintiff to Marson . . . was unconscionable," and as result of such conduct, Marson should, among other things, be awarded punitive damages of at least $2 million (Marson Answer, ¶¶ 108 - 109).

"The doctrine of unconscionability is to be used as a shield, not a sword, and may not be used as a basis for affirmative recovery. Under both the UCC and common law, a court is empowered to do no more than refuse enforcement of the unconscionable contract or clause", *Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604, 606 (2d Dept 1987). Having failed to allege a claim with a cognizable legal theory, Marson's fourth counterclaim is dismissed.

Affirmative Defenses (second through thirteenth):

Marson's second, third and sixth affirmative defenses fail because they do not state any cognizable legal theory, and instead, simply allege plaintiff's knowledge of various facts.

Marson's fourth affirmative defense, alleging that "plaintiff improperly administered the loan(s) . . . [and] acted improperly to the New York State Lien Law Legislative intent" (Marson Answer, ¶ 31) does not state a cognizable legal theory, and is dismissed.

Marson's fifth affirmative defense, alleging that "Plaintiff failed to comply with all of the terms and conditions of the loan agreement(s) . . . [therefore, requiring that the Loans] must be subordinated to the lien and claim(s) of Marson (*id.* ¶ 32), has no legal basis. Marson is not a party to the Loan Agreements (or a third-party beneficiary), and cannot recover on them. Accordingly, this defense is dismissed.

Marson's seventh affirmative defense, alleging that "Plaintiff has waived any entitlement to payment based upon modifications" (*id.* ¶ 34), lacks any factual basis. Accordingly, this defense is dismissed.

Marson's eighth affirmative defense alleges that "Plaintiff failed to follow the lien law statutory requirements, including . . . inaccuracies in the net sum(s) available to defendant Marson" (*id.* ¶ 35). However, as previously determined, Marson's allegations respecting plaintiff's compliance with the Lien Law do not state a claim, and for the same reasons, do not provide a basis for this defense. Further, documentary evidence contradicts Marson's claim that there were inaccuracies in the description of the net sum available (*compare* Exs. E and F to Marson's memorandum of law in opposition). Accordingly, this defense is dismissed.

In its ninth affirmative defense, Marson alleges that "Plaintiff is estopped by the concepts of promissory estoppel and/or equitable estoppel from asserting its claims to the amounts sought in this action" (Marson Answer, ¶ 36). Marson's defense of promissory estoppel has no merit because, as discussed previously, it cannot demonstrate reasonable reliance on plaintiff, *see Williams v Eason*, *supra* at 868. The same defect applies equally to Marson's defense of equitable estoppel, *Richey v Hamm*, 78 AD3d 1600, 1602 (4th Dept 2010) ("All that is required for the application of the doctrine of equitable estoppel is reasonable reliance on fraud, deception or misrepresentation"). Accordingly, this defense is dismissed.

Marson's tenth affirmative defense alleges that "Plaintiff was negligent and/or disregarded, wantonly or otherwise old fashion commonsense" (Marson Answer, ¶ 37). Marson, however, does not allege any contractual or fiduciary relationship between Marson and plaintiff that imposes any duty on plaintiff with respect to Marson. Therefore, this defense is dismissed.

Marson's eleventh affirmative defense, alleging that "Plaintiff failed to follow basic banking and lending practice . . . [including] a reduction in lending obligations upon which [Marson] was relying" (*id.* ¶ 38), is inappropriately vague. In addition, as previously discussed, Marson could not have reasonably relied on the continuation of loan advances to Fort Tryon in view of the warnings to third parties contained in section 2.5.5 (b) of the Building Loan and Project Loan Agreements.

Marson's twelfth affirmative defense, alleging that "Plaintiff followed the 'too big to fail' approach, failing to cease drawdowns [sic] by the Borrower" (*id.* ¶ 39) does not state a cognizable defense, and is, accordingly, dismissed.

Finally, Marson's thirteenth affirmative defense alleges that "Plaintiff attempted to hide its inappropriate business decision(s)

and as such, caused Marson and others to continue to perform work at the Project" (*id.*, ¶ 40). This defense does not state a cognizable claim. Additionally, it is impermissibly vague; Marson does not identify what business decisions were inappropriate or how they caused Marson to work at the Project. Accordingly, this defense is dismissed.

2. Tectonic's Counterclaim and Affirmative Defenses

First Counterclaim (priority of Tectonic's lien):

Tectonic admits that its mechanic's lien against the Property was not filed until May 26, 2009 (Tectonic Answer, ¶ 38), 18 months after plaintiff first recorded its Mortgages (Complaint, ¶ 6). Nonetheless, Tectonic alleges, in conclusory fashion, that the Mortgages are subordinate to its lien (Tectonic Answer, ¶ 40). Because Tectonic pleads no facts as to why its lien should take priority over the prior-recorded Mortgages, its first (and only) counterclaim does not state a claim and is dismissed.

First and Second Affirmative Defenses (failure to join a necessary party):

Tectonic's first affirmative defense alleges that "Plaintiff has not joined necessary parties to this action and, therefore, this action must be dismissed pursuant to CPLR 3211 (a) (10)" (*id.* ¶ 12).

Tectonic's second affirmative defense alleges that ""[a]n action for foreclosure of a mechanic's lien filed by All Rock Crushing, Inc. has been commenced," and that the "plaintiff herein has failed to join the plaintiff in said action as a party to the instant action and, therefore, the instant action must be dismissed pursuant to CPLR 3211 (a)(10) for failure to join a necessary party" (*id.* ¶ 13, 14). However, on its face, this defense cannot be maintained for the simple reason that a review of the caption in this action demonstrates that All Rock is a named defendant. Therefore, this defense is dismissed.

Tectonic's first affirmative defense, alleging failure to join a necessary party, is dismissed on the same ground that this defense was dismissed in motion sequence 001 (*supra*).

Conclusion

Based on the foregoing, it is

ORDERED that plaintiff's motion to dismiss is granted with respect to Fort Tryon Tower SPE LLC's and Rutherford Thompson's first, second, third, fourth and proposed seventh Counterclaims; and fourth, seventh, eighth, ninth, thirteenth through sixteenth, eighteenth, nineteenth, that portion of the twentieth affirmative defense raising estoppel and waiver against enforcement of the Guaranties, twenty-first, twenty-third through twenty-sixth and

proposed twenty-ninth Affirmative Defenses, and is otherwise denied; and it is further

ORDERED that Fort Tryon Tower SPE LLC's and Rutherford Thompson's cross-motion to amend their Answer is granted to the extent it conforms to this decision; and it is further

ORDERED that the branch of plaintiff's motion seeking dismissal of Marson Contracting Co. Inc.'s first through fourth Counterclaims and second through thirteenth Affirmative Defenses is granted; and it is further

ORDERED that the branch of plaintiff's motion seeking dismissal of Tectonic Engineering and Surveying Consultants, P.C.'s only counterclaim and first and second Affirmative Defenses is granted; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in IA Part 39, 60 Centre Street, Room 208 on January 11, 2012 at 11:00 a.m.

This constitutes the decision and order of this Court.

FILED

Dated: December 16, 2011

BARBARA R. KAPNICK
J.S.C.

COUNTY CLERK'S OFFICE

BARBARA R. KAPNICK