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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT:

PART 19

Index Number : 115350/2009

CENTRAL FUNDING COMPANY

VS

C.D. KOBSONS INC., ET AL.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

or _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED PER THE MEMORANDUM DECISION DATED 1/11/13 WHICH DISPOSES OF MOTION SEQUENCES NO. 001 AND 002.

FILED
JAN 18 2013
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
JAN 18 2013
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: 1/11/13

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

---------- X

CENTRAL FUNDING COMPANY AND
COLUMBIA CAPITAL CO.,

Plaintiffs,

- against -

C.D. KOBSONS INC., W.E. ALEXANDER LEE,
NEW YORK STATE DEPARTMENT OF TAXATION
& FINANCE, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, MOHAMMED S. MOJALI,
ABDULLA AHMED, 311 GROCERS CORP.,
CBS OUTDOOR GROUP INC. f/k/a WINSTON
NETWORK INC., JOHN DOE #1 - 50,

Defendants.

---------- X

Index Number: 115350/09
Submission Date: 8/15/12

DECISION and ORDER

For Plaintiffs:
Christopher J. Panny, Esq.
76 Court Street, Suite 34
Brooklyn, NY 11201

Dominic Sarna, Esq.
150 East 37th Street
New York, NY 10016

For Defendant C.D. Kobsons Inc.:
Lawler Mahon & Rooney LLP
36 West 44th Street, Suite 1400
New York, NY 10036

For Defendant Abdulla Ahmed:
Leon Brickman, Esq.
224 Beach 147th Street
Neponsit, NY 11694

For Defendant W.E. Alexander Lee:
Collins, Dobkin & Miller LLP
277 Broadway, Suite 1410
New York, NY 10007

For Defendant NY State Department of Taxation & Finance:
Adam Gitter, Esq.
Office of the NYS Attorney General
300 Vanderbilt Motor Parkway, Suite 125
Hauppauge, NY 11788-5522

For Defendant NYC Environmental Control Board:
Saul Fishman, Esq.
New York City Department of Finance
Office of Legal Affairs
345 Adams Street, 3rd Floor
Brooklyn, NY 11201

Papers considered in review of Plaintiff's motion for summary judgment (motion seq. no. 001):

Notice of Motion/Affirm. of Counsel/Affidavits/Exhibits.....1
Memo. of Law in Supp. to Motion.....2
Memo. of Law in Opp. to Motion/Affidavit.....3
Reply Memo of Law in Supp. 4
Brickman Affirm. in Opp. To Motion.....5
Panny Reply Affirm. in response to Brickman Affirm.....6
Hall Affirm. in Opp. to Motion.....7
Harkavy Reply Affidavit.....8
D'Ambrosio Affidavit.....9

Papers considered in review of Plaintiff's motion for partial summary judgment (motion seq. no. 002):

Notice of Motion/Affirm. of Counsel/Affidavits/Exhibits.....1
Hall Affirm. in Opp. To Motion.....2
Reply Memo of Law in Supp. 3

HON SALIANN SCARPULLA, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In this action to foreclose the property located at the address 311 10th Avenue, a/k/a 500 West 28th Street, New York, New York 10001, plaintiffs Central Funding Company and Columbia Capital Co. (together "Plaintiffs") move (motion seq. no. 001):

(1) for summary judgment dismissing the answer, affirmative defenses, and counterclaims of the defendant C.D. Kobsons Inc. ("Kobsons") and for summary judgment of its foreclosure action against Kobsons pursuant to CPLR § 3212;

(2) for default judgment against New York State Department of Taxation & Finance ("DTF"), NYC Department of Environmental Control Board ("ECB"), Mohammed S. Mojali ("Mojali"), Abdulla Ahmed ("Ahmed"), 311 Grocers Corp. ("311 Grocers"), and CBS Outdoor Group Inc. ("CBS Outdoor Group") pursuant to CPLR § 3215(a);

(3) to appoint a referee to compute and report as against all defendants pursuant to RPAPL § 1321(1);

(4) to amend the title of this action to delete "John Doe #1" through "John Doe #50"; and

(5) to amend the caption of the summons to substitute "CBS Outdoor Network Inc." with the correct name of defendant "CBS Outdoor Group Inc."

Plaintiffs also move (motion seq. no. 002) for partial summary judgment of its foreclosure action against defendant W.E. Alexander Lee ("Lee") dismissing his answer and defenses pursuant to CPLR § 3212.

Background

A. The Mortgage & Other Agreements

Defendant Kobsons is the owner of the land and building located at 311 10th Avenue ("the property"). The building contains one commercial store and six rent-stabilized apartments. On June 12, 2007, Kobsons borrowed $700,000 commercial loan from Plaintiffs. In exchange for the loan, Kobsons executed a promissory note ("Note") and a mortgage ("Mortgage") to Plaintiffs encumbering the property. Plaintiffs recorded the Mortgage and Note at the NYC Department of Finance, Office of the City Register, on June 21, 2007. The maturity date stated in the Note is the "date on which this Note matures and must be fully repaid, unless sooner accelerated, which is June 12, 2008."

On the same date that the Note was executed, Plaintiffs and Kobsons executed two letter agreements: (1) an option to extend the maturity date of the Note ("Loan Extension

Option Agreement") and (2) a tenant loan buyout agreement ("Tenant Buyout Loan Agreement").

The Loan Extension Option Agreement granted Kobsons the right, at its option, "to extend the term of the above-referenced loan for up to four (4) additional, consecutive (6) month periods beyond the current maturity date." To exercise each six-month option, the agreement required Kobsons to: (i) give written notice of its election to Columbia Capital, and (ii) include with its notice a payment equal to one (1.0%) percent of the then-outstanding principal amount as an extension fee, at least fifteen (15) days prior to the then-maturity date.

Under the Tenant Buyout Loan Agreement, Plaintiffs agreed to lend Kobsons up to an additional $400,000 "for the primary purpose of financing the buy-out of existing tenants of the premises." This agreement states that Plaintiffs' "advance for this purpose will require signed buy-out agreements in form approved by [Plaintiffs] Lender." In addition, the agreement states that "[i]t is a further condition precedent of any advances to be made hereunder that there are no defaults under any terms and conditions of our first mortgage of $700,000."

Tenant Buyout Loan Agreement further provides Plaintiffs' loan commitment "shall be null and void in the event of a material adverse change in the condition of the property, substantial damage due to fire or other hazard, or a material change in borrower's or guarantor's financial status."

B. The Foreclosure Action

On October 30, 2009, Plaintiffs commenced this foreclosure action. In the complaint, Plaintiffs allege that the remaining defendants hold the following subordinate interests: (1) DTF is a holder of a tax warrant against Kobsons in the amount of $159.97, docketed with the County Clerk on August 11, 2009; (2) ECB is the holder of numerous judgments against Kobsons based on building code violations; (3) Mojali is an occupant of Apartment 2F under an expired commercial lease or monthly tenancy; (4) Ahmed is an occupant of the commercial store and basement under an expired commercial lease; (5) 311 Grocers is an occupant of the commercial store and basement under an expired commercial lease or monthly tenancy; (6) CBS Outdoor Group is an assignee of a property site lease to maintain signage on the property; and (7) Lee is the holder of a judgment lien against the property, docketed by the County Clerk on January 30, 2009.

On December 4, 2009, Kobsons answered the complaint and asserted four affirmative defenses: lack of consideration, unclean hands, breach of contract, and ripeness. Kobsons also asserted three counterclaims for: (1) a declaratory judgment (i) finding that Kobsons is not in violation of the Note, Mortgage, guaranty and extension agreements; (ii) compelling Plaintiffs to extend the mortgage through and including May 31, 2010, (iii) compelling Plaintiffs to fund the buy-out of certain tenants of the premises, and (iv) finding that any violation by Kobsons is curable; (2) a permanent injunction against foreclosure; and (3) contract and punitive damages.

Lee asserts two defenses in his answer: (1) his money judgment lien is superior to Plaintiffs' Mortgage and therefore cannot be extinguished upon foreclosure; and (2) Plaintiffs should be estopped from extinguishing Lee's lien because they had actual or constructive notice of his claims prior to the execution of the Mortgage.

1. Motion for Summary Judgment Against Kobsons

In support of its motion for summary judgment, Plaintiffs argue that they establish a *prima facie* entitlement to foreclosure against Kobsons. Plaintiffs submit copies of the Note, Mortgage, and receipts of filings with the Office of the City Register to prove the existence of a mortgage. Plaintiffs also submit evidence to demonstrate that Kobsons defaulted on the Mortgage through the affidavits of Stephen J. Harkavy ("Harkavy"), general partner of Central Funding Company, and Rudolf Katz, principal of Columbia Capital Co.

Plaintiffs argue that Kobsons defaulted when it failed to pay the principal balance due by December 12, 2008, the alleged maturity date of the Mortgage. According to Harkavy, the original maturity date of the Mortgage and Note was June 12, 2008, which Kobsons extended to December 12, 2008, by exercising its first six-month option under the Loan Extension Option Agreement. Harkavy Aff., ¶ 29. Harkavy stated that once the Mortgage matured on December 12, 2008, it "was not repaid on that date" by Kobsons. *Id.*, ¶ 140.

Kobsons does not contest that it failed to pay the principal balance due by December 12, 2008. However, in opposition to the motion, Kobsons argues that

Plaintiffs should not be entitled to summary judgment because they created the conditions of Kobsons' default by wrongfully refusing to extend the maturity date for a second time, and refusing to provide a $300,000 loan to Kobsons as required under the Tenant Buyout Loan Agreement.

Further, Plaintiffs argue that Kobsons' answer, affirmative defenses, and counterclaims should be dismissed because Kobsons waived its right to interpose any defenses, except for payment, and waived its right to interpose any counterclaims. Plaintiffs argue that this waiver appears in paragraph 30 of the Mortgage, which states that the "mortgagor and any guarantor hereby severally waive and will waive... (ii) the right to interpose any defense (other than payment), any setoff, and/or any counterclaim to any action brought by mortgagee to enforce the note or this mortgage or any of the loan documents."

According to Doungrat Eamtrakul ("Eamtrakul"), the principal of C.D. Kobsons Inc., Kobsons exercised its first option of "extending the maturity date to December 31, 2009,[1] and that in or around December, 2009, [Kobsons] took steps to extend the maturity date again." However, Eamtrakul states that Plaintiffs rejected Kobsons' second attempt to further extend the mortgage term "on completely spurious grounds."

In their reply, Plaintiffs argue that they did not create the conditions of Kobsons' default. Plaintiffs claim that they refused to extend the maturity date and provide the

[1] Based on the overall context of the dispute and the evidence in the record, I assume that this date is in error and should read December 31, 2008. However, even if this date is correctly set forth, the analysis in this decision remains the same.

$300,000 loan because Kobsons had already defaulted on December 12, 2008, and did not fulfill the conditions of either the Loan Extension Option Agreement or the Tenant Buyout Loan Agreement.

To support their argument, Plaintiffs submit two letters. The first letter, dated December 16, 2008, contains Kobsons' request for a $300,000 loan from Plaintiffs, pursuant to the Tenant Loan Buyout Agreement. In order to invoke its right to the loan, Kobsons stated in the December 16 letter that the loan would be used for "the potential termination of the leases for the commercial tenants on the ground floor (311 10th Avenue Gourmet Deli) and Suite 2F."

The second letter, dated February 11, 2009, contains Plaintiffs' response and rejection of Kobsons' request for the $300,000 loan. According to Plaintiffs, Kobsons could not obtain a loan under the Tenant Loan Buyout Agreement because it did not fulfill the requisite loan conditions. First, Plaintiffs claimed that Kobsons was in default on the Mortgage because it failed to pay the principal balance due by December 12, 2008. Plaintiffs also stated that Kobsons could no longer extend the maturity date beyond December 12, 2008 because it did not send the written notice and the extension fee required under the Loan Extension Option Agreement.

Second, Plaintiffs stated that Kobsons failed to fulfill other conditions for a loan because it did not obtain any tenant buy out agreements, or a certificate from its commercial tenant stating that the lease was subordinate to the Mortgage. Furthermore,

Plaintiffs claimed that an adverse change in the condition of the property occurred as a result of the Article 7A proceeding commenced against Kobsons.

Although Plaintiffs rejected Kobsons' request for the Tenant Buyout Loan and stated that Kobsons no longer had the right to extend the maturity date of the Mortgage, they made an offer in their February 11 letter to retroactively extend the maturity date of the Mortgage on the condition that Kobsons: (a) acknowledge that Plaintiffs had no further obligation under the Tenant Buyout Loan Agreement, (b) provide financial statements to establish that Kobsons possessed sufficient funds to make repairs and make mortgage payments, and (c) pay the $7,000 extension fee. According to Harkavy, Kobsons never fulfilled any of the conditions retroactively to extend the maturity of the loan.

2. Motion for Partial Summary Judgment Against Lee

Plaintiffs also argue that Lee's answer and defenses should be dismissed. Plaintiffs argue that the Mortgage is superior to Lee's judgment lien because it has first in time priority because the Mortgage was recorded on June 21, 2007, and Lee's judgment lien was not docketed until January 30, 2009.

In opposition, Lee argues that his lien is superior to the Mortgage because it is based on a rent overcharge award issued by the Division of Housing and Community Renewal (DHCR) on March 28, 2007. According to Lee, the carryover liability provision

of the Rent Stabilization Code § 2561(f) preserves his judgment lien through a judicial foreclosure sale.

Lee also argues that Plaintiffs should be estopped from extinguishing Lee's lien because they had actual or constructive notice of his rent overcharge award prior to the execution of the Mortgage. In the event that his lien is extinguished, Lee requests the right to withhold rent from any future owner of the property.

3. Motion for Default Judgment and to Appoint Referee

In their motion, Plaintiffs argue that they are entitled to a default judgment against defendants DTF, ECB, Ahmed, Mojali, 311 Grocer, and CBS Outdoor Group and to amend the caption to delete the fictitious "John Doe" defendants. Plaintiffs submit an affirmation of their counsel, Christopher Panny ("Panny"), who states that the above named defendants failed to file an answer to the complaint.

In opposition to the motion, defendant Ahmed submits an affirmation of his counsel Leon Brickman ("Brickman"). Brickman claims that Plaintiffs are not entitled to judgment against Ahmed because he is a commercial tenant occupying the store under a valid lease that expires on October 31, 2013. No other opposition has been presented.

Discussion

1. Motion for Summary Judgment Against Kobsons

In a motion for summary judgment, a plaintiff establishes a *prima facie* entitlement to foreclosure by producing evidence of the mortgage, the unpaid note, and evidence of

default. *Greater New York Sav. Bank v. 2120 Realty Inc.*, 202 A.D.2d 248, 248 (1st Dep't 1994); *Village Bank v. Wild Oaks Holding*, 196 A.D.2d 812, 812 (2d Dep't 1993). To defeat plaintiff's motion, the defendant must come forward with competent evidence of any defenses to raise a triable issue of fact. *Barcov Holding Corp. v. Bexin Realty Corp.*, 16 A.D.3d 282, 283 (1st Dep't 2005).

Here, I find that Plaintiffs established a *prima facie* entitlement to foreclosure against Kobsons by producing evidence of the mortgage, the unpaid note, and Kobsons's default. Plaintiffs establish that Kobsons defaulted on December 12, 2008. According to the Note, the original maturity date was June 12, 2008. The maturity date was then extended from June 12, 2008 to December 12, 2008, because Kobsons obtained one six-month extension under the Loan Extension Option Agreement.

Kobsons claims that the maturity date was extended to December 31, 2008, but this claim is unsupported by the record. The Loan Extension Option Agreement states that each extension term is for a six month period. Thus, the first option extended the original maturity date by six months from June 12, 2008 to December 12, 2008.[2]

Plaintiffs also establish that Kobsons failed to pay the unpaid principal balance by December 12, 2008. In his affidavit, Harkavy stated that when the Mortgage matured on

[2] Kobsons suggests in its papers that the original maturity date was May 31, 2008. However, even if the Court were to accept that the original maturity date was May 31, 2008, one six-month extension would have only extended the maturity date from May 31, 2008 to November 30, 2008, and not to December 31, 2008, as Kobsons claims.

December 12, 2008, the Mortgage loan "was not repaid on that date." Kobsons offers no evidence that it made the required payment by December 12.

The burden now shifts to Kobsons to raise a triable issue of fact as to its defenses. Here, I find that Kobsons failed to raise a triable issue of fact that Plaintiffs somehow "created" Kobsons' default. First, Kobsons failed to introduce any evidence to show that Plaintiffs created the conditions of its default by wrongfully rejecting Kobsons' request to extend the maturity date. In her affidavit, Eamtrakul vaguely stated that Kobsons "in or around December, 2009, took steps to extend the maturity date." However, Kobsons submits no further evidence to show that it actually provided the written notice and extension fee required to extend the maturity date beyond December 12, 2008.

Second, Kobsons failed to introduce any evidence that Plaintiffs created the conditions of its default by wrongfully rejecting Kobsons' request for a loan under the Tenant Buyout Loan Agreement. Although Kobsons sent a written letter to Plaintiffs requesting the $300,000 loan on December 16, 2008, Kobsons was already in default on the Note and Mortgage at that time because of its failure to pay the principal balance due by December 12, 2008. As a result of its default, Kobsons could not invoke its right to a loan under the Tenant Buyout Loan Agreement because it was a "condition precedent of any advances" that Kobsons was not in default on the Mortgage. Kobsons further failed to fulfill the other conditions of obtaining a loan from Plaintiffs, such as procuring signed

buy-out agreements from tenants or a certificate from its commercial tenant stating that the lease was subordinate to the Mortgage.

Thus, when Plaintiffs rejected Kobsons' loan request and refused to extend the maturity date in their February 11, 2009 letter, they acted within their contractual rights under both the Loan Extension Option Agreement and the Tenant Buyout Loan Agreement.

Here, I also find that Plaintiffs' offers to retroactively extend the maturity date did not contribute to Kobsons' default. The record shows that Kobsons already defaulted on December 12, 2008, more than two months prior to Plaintiffs' offer. Kobsons made no showing that Plaintiffs offered any assurances to extend the maturity date or provide additional financing such that it would have caused Kobsons to default. *Red Tulip, LLC v. Neiva*, 44 A.D.3d 204, 211 (2007).

Further, Plaintiffs also establish that Kobsons is barred from asserting any defenses, except payment, or any counterclaims in this action. Paragraph 30 of the Mortgage states that Kobsons waives "the right to interpose any defense (other than payment), any setoff, and/or any counterclaim to any action brought by mortgagee to enforce the note or this mortgage." Such a guaranty, signed in connection with a mortgage loan, is sufficient to preclude the assertion of any defenses and counterclaims by defendant. *Citibank, N.A. v. Plapinger*, 66 N.Y.2d 90, 93 (1985); *Red Tulip, LLC v. Neiva*, 44 A.D.3d at 204.

Accordingly, I grant Plaintiffs' motion for summary judgment dismissing Kobsons' answer, affirmative defenses, and counterclaims, and for summary judgment of its foreclosure action against Kobsons.

2. Motion for Partial Summary Judgment Against Lee

In their motion, Plaintiffs argue that they are entitled to summary judgment against Lee because his money judgment lien is subordinate to the Mortgage. To support this argument, Plaintiffs claim that the Mortgage is superior because it has first in time priority over Lee's judgment, which was recorded after the Mortgage. In his defense, Lee argues that although his judgment lien was recorded after the Mortgage, it is a superior lien because it is based on a rent overcharge award which is preserved through foreclosure by the carryover liability provision of Rent Stabilization Code § 2526.1(f). The issue presented here appears to be a novel one – whether a judgment lien, junior in time to a mortgage, survives a foreclosure sale because of the existence of carryover liability.

The Rent Stabilization Code provides that a tenant, who has been overcharged by his or her landlord in excess of the legal regulated rent, may file a complaint with DHCR to recover the amount of the overcharge. N.Y. Comp. Codes R. & Regs. tit. 9, subtit. S, ch. 9 § 2526.1(a)(2). Once an overcharge award has been issued and the period for judicial review has expired, the tenant may choose to recover the award under one of two methods: (1) deduct the amount from the rent due to the present owner at the prescribed

rate, or (2) if no such rent credit is taken, the award "may be entered, filed and enforced by a tenant in the same manner as a judgment of the Supreme Court." § 2526.1(e).

A separate provision of the Rent Stabilization Code, Section 2526.1(f) defines the scope of a present owner's "carryover liability" for any overcharges collected by a prior owner. Under that section, a current owner is responsible "for all overcharge penalties, including penalties based upon overcharges collected by any prior owner" unless the judicial sale exception applies. § 2526.1(f)(2)(i).

The judicial sale exception provides that a current owner is not liable for overcharges collected by a prior owner if: (1) the current owner purchased the property upon or subsequent to a judicial sale; (2) there is an absence of collusion or any relationship between such owner and any prior owner; and (3) no records sufficient to establish the legal regulated rent were provided at the judicial sale. § 2526.1(f)(2)(i).

Here, the DHCR issued a rent overcharge award to Lee on March 28, 2007, and Lee chose to enforce his award against Kobsons as a judgment by docketing it with the County Clerk on January 30, 2009. A judgment becomes a lien on the judgment debtor's property on the date that it is docketed. CPLR § 5203; *Dep't of Hous. Pres. & Dev. of City of New York v. Ferranti*, 212 A.D.2d 438, 439 (1st Dep't 1995). Thus, Lee's judgment became a lien against the property on January 30, 2009, the date that it was docketed.

Based on the date that Lee's judgment was docketed, I find that Plaintiffs have demonstrated that Lee's judgment lien is subordinate to the Mortgage. "It has long been established that first in time priority obtains as between mortgages and judgments." *Bank Leumi Trust Co. of New York v. Liggett*, 115 A.D.2d 378, 380 (1st Dep't 1985). The record shows that Plaintiffs' Mortgage on the property was recorded on June 21, 2007, and Lee did not docket his DHCR award until January 30, 2009.

Lee's argument that his junior lien is preserved, or converted into a superior lien, by virtue of the carryover liability provision is unavailing. The existence of carryover liability for rent overcharges does not alter the rules of foreclosure, or how money judgments are enforced. It is well-settled that upon a foreclosure sale, all junior liens made party to the action, are extinguished. *See* RPAPL § 1311; *Polish Nat. Alliance of Brooklyn, U.S.A. v. White Eagle Hall Co., Inc.*, 98 A.D.2d 400, 404 (2d Dep't 1983). CPLR § 5203 also provides that any judgment liens against a property are extinguished upon a judicial foreclosure sale. § 5203(a)(3); David D. Siegel, New York Practice § 517 (2012). Here, the regulation providing for carryover liability should be read in harmony with existing statutes governing the treatment of judgment liens upon foreclosure. *See Harbolic v. Berger*, 43 N.Y.2d 102, 109 (1977); *Matter of Jones v. Berman*, 37 N.Y.2d 42, 53 ("Administrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute").

In some instances, carryover liability may allow an overcharge claim to continue after a foreclosure sale when the claim has not been reduced to a judgment. *See Gaines*, 90 N.Y.2d at 548 (overcharge claims not entered as a judgment prior to foreclosure sale may be subject to carryover liability if the judicial sale exception did not apply); *East 7th Street Development Corp. v. Paul T. Miller*, 138 Misc.2d 345, 347 (Civ. Ct., New York County 1988) (overcharge award docketed against prior owner could not be deducted as an offset against new owner). However, in this case, Lee's award was converted into a judgment lien and is therefore subject to the statutes governing judgment liens upon a foreclosure sale.

Lee argues that if his judgment lien is extinguished upon foreclosure, he should be entitled to enforce his overcharge award by offsetting his rent against any future owner of the property. However, under the Rent Stabilization Code, Lee is only entitled to pursue one remedy – either offsetting future rent or filing the order as a judgment. *Mazelier v. 634 W. 135, LLC*, 22 A.D.3d 361, 363 (1st Dep't 2005). Although Lee argues that he will have no recourse if his judgment lien is extinguished, Lee may choose to enforce his judgment against Kobsons through other means. *East 7th Street Development Corp. v. Paul T. Miller*, 138 Misc.2d 345, 348 (Civ. Ct., New York County 1988).

I also reject Lee's argument that Plaintiffs should be estopped from extinguishing his lien upon foreclosure because they allegedly had knowledge of his rent overcharge claims prior to the execution of the mortgage. Lee failed to introduce any evidence that

Plaintiffs induced him to rely on the continuation of his judgment lien after foreclosure. *Banque Arabe et Internationale D'Investissement v. One Times Square Associates Ltd. Partnership*, 207 A.D.2d 727, 727 (1st Dep't 1994).

Accordingly, Plaintiffs' motion for partial summary judgment dismissing Lee's answer and defenses and for summary judgment of its foreclosure action against Lee is granted.

3. Motion for Default Judgment and to Appoint a Referee

A. Motion for Default Judgment

CPLR § 3215(a) provides that a plaintiff may seek a default judgment against a defendant who has failed to appear, plead, or proceed to trial. An application for a default judgment must include: (1) proof of service of the summons and complaint; (2) proof of the merits of the claim; and (3) proof of the default. CPLR § 3215(f).

To prove the merits of the claim, an applicant must submit "an affidavit executed by a party with personal knowledge of the merits." *Francisco v. Soto*, 286 A.D.2d 573, 573 (1st Dep't 2001); *Thattil v. Mondesir*, 253 A.D.2d 809, 810 (2nd Dep't 1998). The affidavit of merit must also establish a *prima facie* case against the defendant. *See State v. Williams*, 44 A.D.3d 1149, 1152 (3d Dep't 2007).

In a foreclosure action, the plaintiff is required to join as a defendant, every person having any lien, encumbrance, or interest in possession that is subject to and subordinate

to plaintiff's lien. RPAPL § 1311. The purpose of joining these interests derives from the underlying objective of a foreclosure action – to extinguish the rights of redemption of all those who have a subordinate interest in the property and to vest complete title in the purchaser at the judicial sale. *Polish Nat. Alliance of Brooklyn, U.S.A.*, 98 A.D.2d at 404.

1. DTF, ECB, Mojali, 311 Grocer, and CBS

Here, I find that Plaintiffs are entitled to a default judgment against DTF, ECB, Mojali, 311 Grocer, and CBS. Plaintiffs submitted proper proof of service of the summons and complaint, and proof of default through the affirmation of their counsel, Christopher J. Panny. Panny affirmed that DTF, ECB, Mojali, 311 Grocer, and CBS never submitted an answer to the complaint. Although DTF and ECB each filed a notice of appearance and waiver of service, these filings are not responsive pleadings that preclude the entry of a default judgment. *Leone v. Johnson*, 99 A.D.2d 567, 568 (3d Dep't 1984).

Plaintiffs also submitted a proper affidavit of merit, the complaint verified by Harkavy, who attests that he has personal knowledge of the facts constituting Plaintiffs' claims. *Joosten v. Gale*, 129 A.D.2d 531, 534 (1st Dep't 1987). The verified complaint sets forth a *prima facie* case for foreclosure against DTF, ECB, Mojali, 311 Grocer, and CBS, based on Plaintiffs' claim that each defendant holds a subordinate interest to the Mortgage.

CPLR § 3215(c) provides that a motion for default judgment must be made within one year of the default. However, if the motion is made more than one year after the

default, the court retains discretion to permit entry of a default judgment upon a showing of sufficient cause. *Charles F. Winson Gems, Inc. v. D. Gumbiner, Inc.*, 85 A.D.2d 69, 71 (1st Dep't 1982).

Although the motion for default judgment against Mojali, CBS, and 311 Grocer was filed more than one year after their default, I find that sufficient cause exists to permit the entry of default judgment against these defendants. In order to enter a default judgment after more than one year, a plaintiff must offer a reasonable excuse and demonstrate that their complaint is meritorious. *First Nationwide Bank v. Pretel*, 240 A.D.2d 629, 629 (2d Dep't 1997). Here, Plaintiffs demonstrated that their complaint against Kobsons is meritorious, and they also offered a reasonable excuse based on the existence of ongoing settlement negotiations with Kobsons since December 2010.

2. Ahmed

Plaintiffs are also entitled to a default judgment against Ahmed. Plaintiffs submitted proper proof of service of the summons and complaint and proof of Ahmed's default. Plaintiffs' counsel affirmed that Ahmed never submitted an answer to the complaint. Although Ahmed did submit an affirmation from his own counsel, in opposition to the instant motion, his counsel's affirmation does not constitute an answer which would preclude entry of a default judgment against Ahmed. *See Juseinoski v. Bd. of Education of the City of New York*, 15 A.D.3d 353, 356 (2d Dep't 2005).

Plaintiffs also submit a proper affidavit of merit, the verified complaint, which sets forth a *prima facie* case for foreclosure against Ahmed. According to the verified complaint, Ahmed is an occupant of the store and basement under an expired lease, and his rights of occupancy are subordinate to Plaintiffs' Mortgage.

To avoid entry of a default judgment, a defendant must demonstrate a justifiable excuse for the default and a meritorious defense. *Young v. Richards*, 26 A.D.3d 249, 250 (1st Dep't 2006). Here, Ahmed failed to demonstrate a justifiable excuse as he offered no explanation for his failure to answer the complaint. Ahmed also failed to demonstrate a meritorious defense. Brickman's affirmation, which states that Ahmed's lease is valid until October 31, 2013, is insufficient to establish a meritorious defense because there is no indication that Brickman has any personal knowledge of the facts pertaining to the lease. *Young*, 26 A.D.3d at 250.

Accordingly, Plaintiffs' motion for a default judgment against DTF, ECB, Mojali, 311 Grocer, CBS, and Ahmed is granted.

In accordance with the foregoing, it is

ORDERED that Plaintiffs' motion for summary judgment (motion seq. no. 001) dismissing Kobsons' answer, affirmative defenses, and counterclaims and for summary judgment of its foreclosure action against Kobsons is granted; and it is further

ORDERED that Plaintiffs' motion for partial summary judgment (motion seq. no. 002) against defendant Lee dismissing his answer and defenses pursuant to CPLR § 3212 is granted; and it is further

ORDERED that Plaintiffs' motion for default judgment (motion seq. no. 001) against New York State Department of Taxation & Finance, NYC Department of Environmental Control Board, Mojali, Ahmed, 311 Grocers Corp., and CBS Outdoor Group Inc. is granted; and it is further

ORDERED that Plaintiffs' motion to appoint a referee (motion seq. no. 001) to compute and report pursuant to RPAPL § 1321(1) is granted; and it is further

ORDERED that Plaintiffs' motion to amend the title of this action (motion seq. no. 001) to delete "John Doe #1" through "John Doe #50" is granted; and it is further

ORDERED that Plaintiffs' motion to amend the caption of the summons (motion seq. no. 001) to set forth the correct name of defendant "CBS Outdoor Group Inc." is granted.

Settle order on notice.

Dated: New York, New York
January 11, 2013

ENTER:

Saliann Scarpulla, J.S.C.