[* 1]

MEMO DECISION & ORDER

INDEX No. 18729/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12/21/12
ADJ. DATES 02/22/13
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - XMD
CDISP Y____ N XX

NORTH COUNTRY DEVELOPERS, LLC.,	
Plaintiff,	KLEIN & VIZZI, LLP Attys for Plaintiff 370 Sunrise Hwy. Suite B West Babylon, NY 11704
- against -	
FAIRWAY ROCK, LLC, GREAT ROCK GOLF, INC., JBGR, LLC, INSURENEWYORK AGENCY, LLC ELLIOTT WR GOLF, LLC, MCAVOY WR GOLF, LLC, DEMPSEY WR GOLF, LLC, WALSH WR, GOLF, LLC, HURNEY WR GOLF, LLC, SPILIOTIS WR GOLF, LLC, THE SUFFOLK COUNTY NATIONAL BANK PAUL ELLIOT, "ABC" CORP., JOHN DOE and JANE DOE, 1-5, being and intended to be tenants or other persons in possession of the premises or having any claims subordinate to the claim of the plaintiff herein,	CIARELLI & DEMPSEY, P.C. Attys. for Defendants Fairway Rock. Elliot & the LLC Defendants 737 Roanoke Ave Riverhead, NY 11901
Defendants.	FIDELITY NATIONAL LAW GROUP Attys. for Suffolk County National Bank 350 Fifth Ave Suite 3000 New York, NY 10118

Upon the following papers numbered 1 to 13 read on this motion by the plaintiff for accelerated judgments other relief including the appointment of a referee to compute and cross motion by defendant Suffolk County National Bank for an award of surplus monies ; Notice of Motion/Order to Show Cause and supporting papers 1 -4 ; Notice of Cross Motion and supporting papers 5-7 ; Answering Affidavits and supporting papers 8 ; Replying Affidavits and supporting papers 9-10; 11-12 ; Other 13 (memorandum) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff in this commercial mortgage foreclosure action for summary judgment on its complaint against all answering defendants, and in effect, the fixation of the defaults of those defendants who did not answer together with an order dropping certain

named defendants and appointing a referee to compute is considered under CPLR 3212, 3215, 1003 and RPAPL 1321 and is granted; and it is further

ORDERED that the cross motion by defendant Suffolk County National Bank for an order directing that it be paid all surplus monies remaining after the public sale, if any, is considered under RPAPl § 1361, and under §1351, §1354 and is denied.

The plaintiff commenced this action to foreclose a September 29, 2006 mortgage given by defendant, Fairway Rock, LLC (hereinafter Fairway or borrower defendant) to secure a mortgage loan in the amount of $950,000.00 evidenced by a note executed by Fairway on the same day as the mortgage. The mortgage appears to encumber two parcels situated on Sound Avene in Wading River, New York that are used in aid of the operation of a golf course thereon or nearby. This mortgage was recorded in the office of the Suffolk County Clerk on October 6, 2006. Since, however, the names of the mortgagor (Fairway Rock) and the mortgagee (North Coast Developers) were reversed on the recording page issued by the Clerk, a correction mortgage was recorded on December 11, 2008 with the Clerk.

A written guaranty of the obligations of the corporate borrower defendant was executed on September 29, 2006 by defendant Paul Elliott. In March of 2010, the plaintiff, as lender, and the defendant borrower executed a Modification of Note and Mortgage Agreement which extended the quarterly payment of interest only until September 29, 2011 at which time amounts of principal and accrued interest were due. In June of 2011, Fairway defaulted in its quarterly interest payment obligations and further defaulted in the payment of principal and accrued interest on the extended maturity date of September 29, 2011. Except for the guarantor defendant, Paul Elliott, all other known defendants were joined herein by virtue of their ownership interests in mortgages, all of which are alleged to be subordinate to the mortgage lien of the plaintiff.

Following service of the plaintiff's summons and complaint upon the known defendants listed in the caption, defendant Fairway, its guarantor co-defendant Paul Elliott and each of the LLC defendants appeared herein by service of a single answer. Therein, these defendants assert three affirmative defenses, two of which assert a failure to join necessary parties and another alleging a failure to state a claim. Corporate defendant, Great Rock Golf, Inc., failed to appear herein by answer or otherwise.

The Suffolk County National Bank defendant (hereinafter SCNB) also appeared herein by service of its separate answer. No affirmative defenses were asserted in this answer and its denial of the plaintiff's pleaded claim that SCNB's joinder was due to its ownership of subordinate mortgages is asserted upon denial of information sufficient to form a belief as to the truth of such claim. However, by way of counterclaim and cross claim, SCNB asserts that it is the owner of a 1999 mortgage on a parcel situated on Sound Avenue denominated as Parcel I.

On December 11, 2008, title to Parcel I and to Parcel II, which is the subject of the plaintiff's mortgage, was transferred out of Fairway Rock to some or all of the LLC defendants. In connection therewith, SCNB issued more loans to the new owners, including one that encumbered Parcel II. That mortgage was recorded in the Clerk's office in January of 2009. Also executed on December 11, 2008,

was a Consolidation, Modification, Extension and Spreader Agreement, by which, SCNB's 1999 mortgage was consolidated with the new December 11, 2008 mortgage that encumbered Parcel II as well as Parcel I. These transactions, culminated in the formation of a single lien in favor of SCNB on both Parcel I and Parcel II. Without putting the issue of the priority of its consolidated mortgage over that of the plaintiff's 2006 mortgage by the assertion of an affirmative claim for a declaration with respect thereto, SCNB demands the following relief:

> In the event that this Court determines that Plaintiff's claimed mortgage has priority over the SCNB Liens on Parcel II, in whole or in part, and any portion of Parcel II is sold pursuant to a judgment of foreclosure and sale obtained by the Plaintiff and results in a surplus, SCNB hereby claims title to such surplus monies or so much thereof as is necessary to satisfy the SCNB liens.
>
> WHEREFORE, Defendant SCNB demands judgment awarding SCNB all surplus monies or so much thereof as is necessary to satisfy the SCNB liens, in the event that this Court determines that Plaintiff's claimed mortgage has priority over the SCNB Liens on Parcel II, in whole or in part, and any portion of Parcel II is sold pursuant to a judgment of foreclosure and sale obtained by the Plaintiff and results in a surplus.

By the instant motion (#001), the plaintiff seeks summary judgment on its complaint for foreclosure and sale and a deficiency judgment against the mortgagor and guarantor defendants and, in effect, a default judgment on its complaint against corporate defendant Great Rock Golf, Inc. In addition, the plaintiff seeks an order dropping as party defendants the unknown defendants listed in the caption, including ABC Corp. The plaintiff further requests the issuance of an order appointing a referee to compute amounts due under its mortgage of September 29, 2006. No opposition to this application has been received by the court.

The SCNB defendant cross moves (#002) for summary judgment on the joint counterclaim and cross claim for an award of surplus monies that is advanced in its answer. The plaintiff takes no position with respect to SCNB's demands for an award of surplus monies. However, the plaintiff challenges the cross motion only to the extent that it may be construed as asserting a counterclaim for a declaration that the lien of the SCNB has priority over the plaintiff's mortgage lien. In this regard, the plaintiff notes that its submissions, coupled with the facts alleged in the SCNB answer and cross moving papers, establish that the plaintiff's 2006 mortgage is prior to the December 11, 2008 mortgage lien encumbering the common parcel known as Parcel II that was given to SCNB by the fee owners to secure a mortgage loan of that same date.

The mortgagor, guarantor and LLC defendants also oppose SCNB's cross motion but on markedly different grounds. These defendants claim that SCNB lacks standing to assert its surplus money claim because the mortgage giving rise to such claim was transferred by SCNB to a non-party to this action by a post-commencement assignment and sale. In its reply papers, counsel for the SCNB rejects this opposition on the grounds that the permissive rather than mandatory nature of the substitution upon transfer of interest provisions of CPLR 1018 allow SCNB to continue to assert its

surplus money claims in this action. For the reasons stated below, the court grants the plaintiff's motion-in-chief but it denies the cross motion by SCNB.

It is well established that in an action to foreclose a mortgage and deficiency judgment against obligors under the note or any written guaranty, a prima facie case is made by the plaintiff's production of the note and mortgage and proof on the part of the defendant/mortgagor and any guarantors of a default in payment or any other material term set forth in the mortgage (*see* ***Garrison Special Opportunities Fund, L.P. v Arthur,*** 82 AD3d 1042, 918 NYS2d 894 [2d Dept 2011]; ***Swedbank, AB v Hale Ave. Borrower, LLC.***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; ***Rossrock Fund II, L.P. v Osborne***, 82 AD3d 737, 918 NYS2d 514 [2d Dept 2011]). Here, the plaintiff established its entitlement to summary judgment on its complaint by its production of the September 29, 2006 note and mortgage and the written guaranty of defendant Elliott, together with due proof of the defaults in payment of amounts due and owing thereunder.

It was thus incumbent upon the answering defendants to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of some legal defense asserted in the answer or otherwise available to such defendants (*see* ***Flagstar Bank v Bellafiore,*** 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021 907 NYS2d 22 [2d Dept 2010]; ***Wells Fargo Bank v Karla,*** 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***J.P. Morgan Chase Bank, N.A. v Agnello,*** 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Aames Funding Corp. v Houston,*** 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]). Notably, self-serving and conclusory allegations do not raise issues of fact and do not require plaintiff to respond to alleged affirmative defenses which are based on such allegations (*see* ***Charter One Bank, FSB v Leone***, 45 AD3d 958, 845 NYS2d 513 [3d Dept 2007]; ***Rosen Auto Leasing, Inc. v Jacobs***, 9 AD3d 798, 780 NYS2d 438 [3d Dept 2004]). Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see* ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; *see also* ***Madeline D'Anthony Enter., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]).

Here, no opposition to the plaintiff's demands for summary judgment were interposed by either set of answering defendants. No questions of fact requiring a trial on the merits of the plaintiff's claims for foreclosure and sale and a deficiency judgment were raised and none of the affirmative defenses asserted in the answer of the mortgagor, guarantor and LLC defendants were shown to have any merit. Additionally, no bona fide defense to the plaintiff's claims for foreclosure and sale was asserted by defendant SCNB. There was no pleaded claim that the plaintiff's 2006 mortgage, recorded in October of 2006 and again under the correction mortgage of December 11, 2008, was not prior in time and thus superior to SCNB's subsequent December 11, 2008 mortgage that was recorded in January of 2009. Nor did defendant SCNB establish by documentary or other proof that the consolidation of its December 11, 2008 mortgage with its prior 1999 mortgage effectively elevated the priority of the 2008 mortgage to the priority of the 1999 mortgage.

Nevertheless, the answer served by SCNB insinuates that issue has been joined with respect to the priority of the plaintiff's mortgage over SCNB's mortgage by the wording employed in SCNB's

joint counterclaim and cross claim and its demands for an award of surplus money cited above. The court shall thus address the issue of priority that percolates below the surface of these applications.

Traditionally, mortgage lien priorities were governed by the priority of time as it was considered the priority of right. These rules were derived from common law principles that provided that the first transfer of property or an interest therein left the transferor with nothing left to convey so that a second transferee of the same property acquired no title or other interest therein (*see* 1 Mortgages and Mortgage Foreclosure in New York, § 8:9).

These concepts were altered with the adoption of New York's recording acts which date back to the 18th century and are currently codified in Article 9 of the Real Property Law (*see* ***Fort v Burch***, 6 Barb. 60, 66 [NY Gen. Term., 1849]; RPL §290 *et. seq.*). Thereunder, a transferee, contract vendee or encumbrancer of property who qualifies as a good faith purchaser for value and who first records his or her conveyance, contract of sale or encumbrance will defeat prior unrecorded interests and most subsequently recorded interests whenever created. Since a mortgage is considered a "conveyance" under the recording acts, a mortgagee and its assignees may qualify as purchasers for value (*see* RPL §§ 290; 291). However, neither a judgment creditor nor a mechanic's lienor qualify as purchasers for value under the recording acts, although by statute, they generally enjoy priorities upon docketings or filings made under different statutes (*see* CPLR Article 52; Lien Law § 13[1]; 1 Mortgages and Mortgage Foreclosure in New York § 8:12). A mortgage first recorded thus enjoys presumptive priority over later recorded contracts, conveyances and encumbrances, judgments and mechanic's liens (*see* ***ABN AMRO Mtge. Group, Inc. v Pantoja***, 91 AD3d 440, 936 NYS2d 163 [1st Dept 2012]).

Here, the record is devoid of proof that a question of fact exist regarding the plaintiff's pleaded claims that all defendants joined herein due to their possession of subordinate mortgage liens and/or other interests are necessary party defendants because their lien interests are subordinate to the plaintiff's lien and as such are subject to extinguishment upon the sale of the premises. The plaintiff is thus awarded summary judgment dismissing the affirmative defenses set forth in the answer of the mortgagor, guarantor and LLC defendants. The plaintiff is further awarded summary judgment on its complaint for a judgment of foreclosure and sale against all answering defendants, including the SCNB, and a deficiency judgment against the mortgagor and guarantor defendants.

The plaintiff's further application for, in effect, an order deleting the unknown defendants listed in the caption and an amendment of the caption to reflect same is granted. All future proceedings shall be captioned accordingly.

The moving papers also included due proof of the default in answering on the part of the corporate defendant Great Rock Golf, Inc. Accordingly, the defaults of such defendant is hereby fixed and determined. Since the plaintiff has been awarded summary judgment on its complaint against the answering defendants and has established a default in answering by the remaining defendant with respect to such cause, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see* RPAPL § 1321; ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***LaSalle Bank, NA v Pace,*** 31 Misc3d 627, 919 NYS2d 794 [Sup. Ct. Suffolk

County 2011], *aff'd,* 100 AD3d 970, 955 NYS2d 161 [2d Dept 2012]). Such order shall issue separately upon the issuance of this memo decision and order.

The cross-motion by SCNB for an award of surplus monies is denied. Such an award is improper as there's been no satisfaction of any of the conditions precedent nor the observance of the jurisdictional requirements that are imposed upon the granting of that relief by the provisions of RPAPL §1361. For example, the filing and confirmation of the referee's report of sale, the issuance of notice to parties and to others who filed claims against the surplus monies and determination of an entitlement thereto by the court or by reference are conditions precedent to an award of surplus monies. Since none of these have been satisfied, there is no basis to award the plaintiff the surplus monies should any exist after the public sale of the premises.

To the extent that the cross motion of SCNB may be construed as one for an order directing that the plaintiff's judgment contain a direction that SCNB's subsequent and subordinate mortgage be paid out of the surplus, if any, realized by the sale as contemplated by RPAPL §1351(3) and §1354(3), it is considered thereunder and denied. RPAPL §1351(3) provides as follows:

> 3. If it appears to the satisfaction of the court that there exists no more than one other mortgage on the premises which is then due and which is subordinate only to the plaintiff's mortgage but is entitled to priority over all other liens and encumbrances except those described in subdivision 2 of section 1354, upon motion of the holder of such mortgage made without valid objection of any other party, the final judgment may direct payment of the subordinate mortgage debt from the proceeds in accordance with subdivision 3 of section 1354.

This statutory provision authorizes the direct payment of surplus monies derived from a mortgage foreclosure sale to the holder of a valid second mortgage and allows the second mortgagee to be paid without having to bear the delay and expense attendant with surplus money proceedings (*see* ***Liberty View Ltd. Partnership v 90 West Assoc.***, 150 Misc2d 913, 571 NYS2d 376 [Sup Ct. New York County, 1991]). Upon a successful motion by a subordinate mortgagee under this section, RPAPL §1354(3) authorizes the court to make provisions in the judgment of foreclosure that the referee apply surplus monies directly in satisfaction of the subject second mortgage.

Here, the cross moving papers include no allegations, let alone proof, that SCNB's 2008 mortgage lien encumbering Parcel II is subordinate only to the 2006 mortgage lien of the plaintiff for which foreclosure is sought. Indeed, the record suggests otherwise. Moreover, there are no allegations or proof that SCNB's 2008 mortgage is entitled to priority over all other liens and encumbrances as required by RPAPL § 1351(3), except those prioritized under subsection 2 of RPAPL §1354. SCNB thus failed to establish the statutory requirement that there be "no more than one other mortgage on the premises which is then due" and that its mortgage "is entitled to priority over all other liens and encumbrances except those described in subdivision 2 of section 1354" (*see* RPAPL §1351[3]).

Finally, the court finds that the claim that SCNB lacks standing to collect surplus monies, advanced by the mortgagor, guarantor and LLC defendants, and premised on SCNB's post-

commencement assignment of its 2008 mortgage has not been shown to be without merit as a matter of law. While the court acknowledges the appellate case authorities issued under the permissive, rather than mandatory substitution provisions of CPLR 1018 upon which SCNB relies to defeat the lack of standing defense (*see* ***CitiMortgage, Inc. v Rosenthal***, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2012]; *see also* ***Mortgage Electronic Registration Systems, Inc. v Korolizky***, 100 AD3d 605, 952 NYS2d 902 [2d Dept 2012]; ***Mortgage Electronic Registration Sys., Inc. v Thomposn***, 99 AD3d 669, 952 NYS2d 86 [2d Dept 2012], none of these case authorities involve an unripened claim for surplus monies such as the one asserted by SCNB in this action. For these reasons and those set forth above, the court denies the cross motion by SCNB.

Proposed order of reference attached to the plaintiff's moving papers, as modified by the court, has been marked signed.

Dated: March 5 2013

THOMAS F. WHELAN, J.S.C.