Flatiron Notebuyer, LLP v 1141 Realty LLC
2013 NY Slip Op 32399(U)
September 24, 2013
Sup Ct, New York County
Docket Number: 810225/11
Judge: Joan A. Madden
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[* 1]
SCANNED ON 10/8/2013

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

PRESENT: JOAN A. MADDEN
Justice

PART 11

First Central Savings Bank,
Plaintiff,

-v-

1141 Realty LLC, etc.
Defendant.

INDEX NO. 810225/11

MOTION DATE

MOTION SEQ. NO. 03

MOTION CAL. NO.

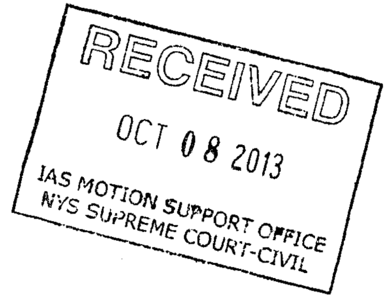
The following papers, numbered 1 to ____ were read on this motion to/for summary judgment.

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

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion + cross motion are decided in accordance with the annexed Memorandum Decision and Order

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



Dated: September 24, 2013

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SJD

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

--X

FLATIRON NOTEBUYER, LLP,

Plaintiff,

-against-

Index № 810225/11

1141 REALTY LLC, MING CHU WU LI, IBRAHIM SALEH a/k/a ABRAHAM SALEH, YAACOUB Y. SALEH, MAIN TEAM HOTEL LLC, MING CHU COMPANY LTD., THE CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, BORN TO BUILD LLC, RICHARD ALAN DALEY, ARCHITECT, EKISTICS DEVELOPMENT, CORP., FORGE ENTERPRISES INC., ASSOS CONSTRUCTION CORP., POLAR BEAR COOLING INC., KAMBANIS ARCHITECT PLLC, and "JOHN DOES NO. 1" through "JOHN DOE NO. 50,"

Defendants.

--X

JOAN MADDEN, J.:

In this foreclosure action, Brick 1141 Capital LLC (Brick Capital), as assignee to plaintiff First Central Savings Bank (First Central), moves for orders: (1) granting summary judgment in favor of Brick Capital and against defendants 1141 Realty LLC (1141 Realty), Forge Enterprises (Forge) and Flatiron Hotel LLC (Flatiron Hotel) s/h/a John Doe # 1; (2) granting Brick Capital a default judgment, pursuant to CPLR 3215, against certain remaining defendants; (3) appointing a referee to compute the amount due plaintiff's assignee Brick Capital; (4) appointing a receiver for the preservation of the premises; and (5) amending the caption and substituting Brick Capital for the prior plaintiff First Central and substituting Flatiron Hotel LLC ("Flatiron Hotel") for John Doe # 1. 1141 Realty and Flatiron Hotel submit separate opposition to the motion, and Forge, a lien holder, submits partial opposition to the motion. The remaining defendants have either failed to submit opposition or to otherwise appear in the action.

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As to the threshold issue regarding substitution, the court grants plaintiff's motion to substitute Brick Capital as plaintiff and Flatiron Hotel as John Doe 1. The motion to substitute Brick Capital is granted *nunc pro tunc* as of December 1, 2012 for the following reasons. While this motion for, *inter alia*, summary judgment and substitution was *sub judice,* the decision was held in abeyance pending a subsequent motion to substitute Flatiron Notebuyer as plaintiff. By order dated August 27, 2013, the court granted the subsequent motion; Flatiron Notebuyer was substituted as plaintiff and the caption amended. As the motion to substitute Brick Capital was made prior to the motion to substitute Flatiron Notebuyer, and, as Flatiron Notebuyer is the assignee of Brick Capital, the motion to substitute Brick Capital for First Central is properly granted *nunc pro tunc* as of December 1, 2012. As to plaintiff's motion to substitute Flatiron Hotel for John Doe 1, this part of the motion is granted as plaintiff alleges Flatiron Hotel has an interest in the property by virtue of its operation of a hotel on the premises.

1141 Realty filed a cross-motion to plaintiff's motion seeking substitution. The cross-motion seeks various relief, including placing in escrow an amount equal to default interest which plaintiff contends, and 1141 Realty disputes, is due for the period between November 1, 2010 and June 30, 2011. Flatiron Notebuyer opposes the cross motion on numerous grounds, including that the cross motion is an improper attempt to reargue the issues in the summary judgment motion which is *sub judice*. 1141 Realty's cross-motion is consolidated for disposition with the instant motion.

Factual Background and Allegations

The following facts underlying the parties' dispute are taken from party affidavits, the pleadings and the documentary evidence and are undisputed unless otherwise indicated.

In 2007, 1141 Realty obtained two "interest only" construction loans from First Central, the first in the amount of $5 million, and the second in the amount of $3 million, for the purpose of funding renovations to a commercial hotel property owned by defendant 1141 Realty and located at 1141 Broadway, New York, New York (the Hotel Property). The first loan was secured by a mortgage on the Hotel Property, dated April 13, 2007 ("The First Mortgage"), and by a note (Note 1), of the same date, evidencing the debt with a maturity date of May 1, 2009.

Under the terms of Note 1, 1141 Realty was obligated to pay monthly installments of interest at a rate of 9.25% on the first day of each month, from May 1, 2007 until the May 1, 2009 maturity date, at which time the entire principal ($5 million) was to be repaid. The First Mortgage provides, in relevant part:

> 7. Default. The whole of said principal sum and interest shall become due at the option of the Mortgagee: after default in the payment of any installment of principal or of interest for fifteen (15) days; or after default in the payment of any tax, water rate, sewer rent or assessment for thirty (30) days after notice and demand; . . . or after default upon request in furnishing a statement of the amount due on this Mortgage and whether any offsets or defenses exist against the Indebtedness . . . .
>
> 8. Additional Defaults. In addition to the defaults set forth in paragraph 7, the whole of said principal sum and the interest and all other amounts secured by this Mortgage shall become due at the option of the Mortgagee, without further notice except as expressly set forth herein [a - q].
>
> * * *
>
> 39. General Provisions. This mortgage may not be changed or terminated orally....
>
> * * *
>
> 41. Retention and Exercise of Rights. Any failure by the Mortgagee to insist upon the strict performance by the Mortgagor of any of the terms and provisions hereof shall not be deemed to be a waiver of any of the terms and provisions hereof. The Mortgagee, notwithstanding any such failure, shall have the right thereafter to insist upon the strict performance by the Mortgagor of any and all of the terms and provisions of this Mortgage and Note to be performed by the Mortgagor without any special or additional notice being required. Neither the Mortgagor nor any

> other person . . . obligated for the payment of the whole or any part of the sums now or hereafter secured by this Mortgage shall be relieved of any obligation under this Mortgage (a) by reason of the failure of the Mortgagee to . . . take action to foreclose this Mortgage or otherwise enforce any of the provisions of this Mortgage, or . . . (c) by reason of any agreement or stipulation extending the time of payment or modifying the terms of the Note and this Mortgage or any other Loan Document without first having obtained the consent of the Mortgagor or such person. In any such event, the Mortgagor . . . shall continue to be liable to make the payments and satisfy the other obligations under the Loan Documents, subject only to the terms of any such agreement of extension or modification, unless expressly released and discharged in writing by the Mortgagee . . . .

(First Mortgage, ¶'s 7, 8, 39 and 41). In the event of default, the First Mortgage also provides for an "Alternate Interest Rate" of 24% per annum (*id.* ¶ 47).

Approximately seven months later, 1141 Realty obtained the second loan from First Central. In exchange for the second loan, on November 29, 2007, 1141 Realty executed and delivered to First Central a second mortgage ("The Second Mortgage"), securing the Revolving Commercial Promissory Note (Note 2), which 1141 Realty executed in favor of First Central in the principal amount of $3 million. As with Note 1, 1141 Realty was obligated to make monthly interest payments at the rate of 9.25% pursuant to the terms of the note from May 1, 2007 until the May 1, 2009 maturity date when the balance of the principal was also due. The Second Mortgage also provided for an "Alternate Interest Rate" of 24%, and specified that in the event of a "default in the payment of any installment of principal or of interest for fifteen (15) days; or after default in the payment of any tax, water rate, sewer rent or assessment for thirty (30) days after notice and demand . . ." the principal sum, interest and all other amounts secured by the mortgage "shall become due at the option of the Mortgagee, without further notice except as expressly set forth herein [a - q]" (Second Mortgage, ¶'s 7 and 8). The provisions of the Second

Mortgage, including the above quoted paragraphs 39 and 41, are substantially the same as those agreed to in the First Mortgage.

It is undisputed that, by written agreements entitled "First Amendment to Mortgage Note and Other Loan Documents" and "Modification and Extension Agreement," dated August 27, 2009, and duly recorded with the City Register, in exchange for certain consideration, both mortgages and notes were amended, and the maturity date of each was extended for a period of six months, from May 1, 2009 to November 1, 2009.[1] Construction continued, and on or about June 20, 2011, 1141 Realty secured a lessee, Smart Apartments, LLC, which, through its corporate affiliate Flatiron Hotel, handled the management of the Hotel Property.

On July 15, 2011, First Central commenced this action to foreclosure by filing a summons and complaint, together with a notice of pendency, in the New York County Clerk's Office. Not long after, by separate written assignments, each dated August 16, 2011, both the first and second mortgages and notes, as amended and extended, were assigned to Brick Capital. The assignments were recorded with the City Register on August 31, 2011. On the same date, August 31, 2011, First Central also assigned the instant foreclosure action to Brick Capital and stipulated to the substitution of Brick Capital as the plaintiff.

On or about October 18, 2011, 1141 Realty commenced a separate, but related, declaratory judgment action against First Central and Brick Capital seeking a declaration that the maturity dates for both mortgages and notes on the Hotel Property had been modified and extended, and that the proper interest rates for calculating amounts due under both mortgages and

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[1] With respect to the second mortgage's modification and extension agreement, the principal amount of 1141 Realty's indebtedness was adjusted and reduced to $2,998,978.28, to accurately reflect the amount drawn on Note 2.

notes was 9.25%, and not the default interest rate of 24%.[2] Subsequently, after consolidation of that action and the instant action, the declaratory judgment action was dismissed on the grounds that the issue of the proper interest rate could be raised as an affirmative defense in the foreclosure action. In fact, this issue is raised in this motion and is addressed below.

According to the plaintiff's amended verified complaint, 1141 Realty defaulted on both the notes by failing to pay the entire balances, which were due and owing on the November 1, 2009 maturity date, and such amounts remain unpaid, despite the acceleration letter sent by First Central's chief lending officer, Thomas J. Stevens (Stevens), on May 25, 2011. Plaintiff was demanding the sum of $5,116,660.97, due and owing under the first note, together with subsequently accruing interest at the default interest rate of 24%, until the date payment is received in full, plus costs and fees; and the sum of $2,998,978.28, due and owing under the second note, together with subsequently accruing interest at the default interest rate of 24%, until the date payment is received in full, plus costs and fees.

However, in reply, plaintiff conceded that the default date is November 1, 2010, not November 1, 2009, based on its acknowledgment that it is bound by the acts of First Central, and that First Central agreed to extend the maturity date of the notes to the November, 2010 date.

In support of its current motion, plaintiff submits copies of the duly recorded loan documents and assignments, including the notice and amended notice of pendency it filed with the County Clerk, together with the sworn affidavit of Eric Roth (Roth), the managing member of Brick Flatiron Capital LLC, a member of Brick Capital, to establish 1141 Realty's default.

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[2] The parties use the terms "alternate interest rate" and "default interest rate" interchangeably. The declaratory judgment action was commenced under New York County index No. 111846/11.

Roth's affidavit provides, in relevant part:

> 8. Prior to the commencement of this action, the defendant 1141 Realty failed to comply with the conditions of [the mortgage/notes] by failing and omitting to pay the entire balances due and owing on the maturity date of both loans, viz. November 1, 2009, and such amounts remain unpaid.
>
> * * *
>
> 10. By reason of the foregoing default, the balance of monies secured by Mortgage No. 1 is now due and payable in the amount of $5,000,000.00 plus (i) interest at the rate provided for in the Loan Documents, (ii) accrued and unpaid late charges, (iii) any sums advanced by plaintiff to protect its interest in the property, (iv) reasonable attorney's fees pursuant to the Loan Documents, (v) a prepayment penalty, if any, (vi) default rate interest, and (vii) any other amounts advanced by Plaintiff to protect its interest herein.
>
> 11. [Paragraph identical to paragraph 10 except for substitution of amount applicable to Mortgage/Note 2 which Roth asserts in the amount of $2,998,978.28].
>
> 12. Subsequent to the commencement of this action, Mortgage No. 1 was assigned by First Central to Brick Capital . . .
>
> 13. Subsequent to the commencement of this action, Mortgage No. 2 was assigned by First Central to Brick Capital . . .
>
> * * *
>
> 17. As managing member of Brick Capital, the incoming plaintiff, I am personally familiar and have personal knowledge of Brick Capital's business practices and procedures. My determination of the amount due, the advances made and the facts surrounding the defendants' default on the notes and mortgages is based upon my personal review of Brick Capital's records regarding the subject notes and mortgages, all of which are made and maintained in the regular course of plaintiff's business.

Based on Ross' affidavit, the documentary proof it submits, and its concession that November 1, 2010 is the maturity date, plaintiff contends it has established entitlement to summary judgment on its causes of action to foreclose against 1141 Realty and other defendants.

1141 Realty opposes the motion, and based on arguments in its memorandum of law, and contentions in the supporting affidavit of its principal, John Mei (Mei), argues that First Central

extended the maturity dates indefinitely, and that principles of waiver, estoppel, and partial performance preclude foreclosure.[3] 1141 Realty does not dispute that the mortgages require modifications, including extensions of maturity dates, to be in writing. 1141 Realty contends, however, that certain electronic communications from First Central to 1141 Realty extended the maturity dates of the notes, and that plaintiff waived any default by failing to demand repayment of the principal amounts as to either note on November 1, 2010; continuing to accept interest payments at the 9.25% rate after November 1, 2010; permitting 1141 Realty to bring its obligations current; negotiating further extensions of the maturity date for both notes; and providing payoff letters and statements from First Central based on interest calculated at 9.25%, rather than at the default rate of 24%. In addition to waiver, 1141 Realty argues that principles of estoppel create issues of fact precluding summary judgment based on 1141 Realty's reliance on First Central's representations that no default would be declared, and that the maturity date would be extended indefinitely when it continued to perform under the terms of the notes by making monthly payments, rather than paying off the principal, and by continuing with its efforts to convert the property into a hotel and find an appropriate lessee.

In his affidavit Mei states that First Capital was satisfied with their financial arrangements, so much so that it routinely extended the maturity dates, without regard to the fact that a given maturity date had passed, and without regard to instances when 1141 Realty's payments were tardy. Mei asserts that maturity dates would routinely be permitted to lapse while

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[3]1141 Realty's fifth affirmative defense asserts plaintiff's claims are barred by "doctrines of laches, waiver, ratification and estoppel." The defenses of laches and ratification are deemed abandoned. While arguments with respect to estoppel and partial payment are not explicitly addressed in 1141 Realty's memorandum of law, they are considered as they implicit in certain of its arguments and are addressed in plaintiff's papers.

[* 10]

the parties negotiated the terms of further modifications and extensions to the notes which would be reduced to writing months after a given maturity date. According to Mei, First Central continued to accept monthly payments during the periods of negotiation, and after November 1, 2010, First Central agreed to modify and extend the maturity dates on both notes indefinitely.

In support of its contentions that the parties were performing under the terms of an extended note, 1141 Realty points, *inter alia*, to the following communications from First Central; a January 8, 2011 loan statement, two emails Mei received from Charles Scott (Scott) of "Collections," dated July 1 and July 8, 2011,[4] and two payoff statements for Note 1 and loan statements for Note 2, dated July 1, 2011. 1141 Realty argues that these communications show that First Central never declared 1141 Realty in default and that 1141 Realty continued to make,

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[4] Scott's first email, which appears to be dated July 1, 2011, states:

> Dear Mr. Mei,
> As promised, the attached file contains the interest amounts due on each loan for July 1. For loan 01-00107234 I've included the statement of 6/17/11 which itemizes interest due of $23,265.15. For loan 01-00007020, I've included a loan payoff statement which itemizes interest for 30 days (6/1 thru 6/30/11), at a daily amount of $1,284.72, for a total due of $38,541.54. The total amount due as of 7/1/2011, on the combined loans is $61,806.69. Should you have questions, do not hesitate to contact me.

Scott's second email, which appears to be dated July 8, 2011, states:

> Dear Mr. Mei,
> Confirming our conversation this morning, please reply to this email providing affirmation of your intentions for the following transactions to be executed today by First Central [] for loans 0100007020 and 0100107234. The attached file includes previous emails to yourself (6/29/2011 and 7/1/2011), which summarize the agreed upon transactions to follow. The transactions are as follows:
> Each amount will be debited from Checking Account 0200032787.
> Loan 0100107234 will be credited for the interest due on 7/1/2011 of $23,265.15.
> Loan 0100007020 will be credited for the interest due on 7/1/2011 of $38,541.54.
> Loan 0100007020 will be credited for $91,149.22 to effect the required escrow repair.
> Please note your approval/authorization and reply to this email. Subsequent to receipt I will have the transactions executed and confirm same to you via email.

and the bank continued to accept, interest payments at the annual rate of 9.25%. Specifically, 1141 Realty contends that the January 2011 loan statement shows the acceptance of the 9.25% interest rate until the end of December 2010, and that Scott's July 1 and July 8 emails as well as the loan payoff statements for Note 1 and the loan statements for Note 2 show, respectively payoff amounts, calculated at, and payments debited by First Central at the 9.25% interest rate.

Next, 1141 Realty argues that the email Mei received from First Central's chief lending officer (Stevens) on May 25, 2011, which plaintiff characterizes as an acceleration letter, also failed to declare either note to be in default or demanded default interest rate or fees associated with either lateness or default.

Mei contends he was surprised when, in the latter part of summer of 2011, the bank would no longer accept payments for either loan and that Brick Capital, the then recent assignee, refused to discuss a payoff or a modification of the loans, insisting instead, on a payoff of the principal together with interest at the rate of 24%, from November 1, 2009 to the present. Mei also states he was surprised to learn that a notice of pendency had been filed against the Hotel Property; and that the foreclosure action had been commenced.

In response to 1141 Realty's affirmative defense of waiver and estoppel, plaintiff denies the existence of any modifications to the mortgage and notes, other than an agreement by First Central to extend the maturity date of the loan to November 1, 2010. Plaintiff argues that its right to enforce the terms of the loans, including its right to refuse further loan payments, to refuse a loan modification, and to insist on a payoff of the principal at the defaulting alternate interest rate of 24%, from the extended maturity date of November 1, 2010, to the present, was not waived.

With respect to the affirmative defenses of waiver and estoppel, plaintiff points to identical paragraphs numbered 42 in both mortgages ("paragraphs 42") which prohibit extension, modification, or waiver of the terms of either loan in the absence of a signed writing. Paragraphs 42 provide:

> No waiver of any right set forth in this Mortgage or any of the other Loan Documents shall be deemed effective unless in writing and signed by an officer of Mortgagee and any modification, amendment or termination shall be valid only if in writing and signed by a duly authorized officer of Mortgagee. The failure by Mortgagee to enforce any of its rights under any of the Loan Documents if a default occurs shall not affect the ability of Mortgagee to exercise such rights in the event of any subsequent default. No discussions, negotiations or oral statements by Mortgagee or between Mortgagor and Mortgagee with respect to the subject matter of any of the Loan Documents, or with respect to the refinancing of any of the Indebtedness, shall be valid and binding against Mortgagee, nor shall the same create a binding obligation on Mortgagee to lend money to take any other action with respect to Mortgagor unless the same is reduced to writing and signed by a duly authorized officer of Mortgagee.

Plaintiff argues that as no writing exists extending the maturity date past November 1, 2010, and as paragraph 42 clearly prohibits an oral modification, 1141 Realty's argument lacks merit. Plaintiff further argues that the doctrines of waiver and estoppel, and 1141 Realty's arguments regarding part performance, are inapplicable because First Central never agreed to waive the maturity date of the notes beyond November 1, 2010. Specifically, plaintiff argues that neither Steven's May 25th acceleration letter nor the emails from Scott nor other statements constitute written modifications signed by an officer of the bank. First Central further argues that its acceptance of payments made after November 1, 2010, did not constitute a waiver of rights, a modification of terms, or an agreement to extend the maturity date indefinitely; and that the May 25, 2011 acceleration letter makes it clear that both notes matured on November 1, 2010, and that both were being foreclosed. Plaintiff asserts that Stevens' acceleration letter is pertinent, not just

because it identified November 1, 2010 as the maturity date for both loans, but because of certain declaratory statements it contains including statements regarding the existence of mechanic's liens preventing extension of the loans, sporadic and late payments and a refusal to hold the foreclosure in abeyance pending any refinancing.[5] As to Scott's emails and July 1st payoff and loan statements, plaintiff contends that they do not constitute waivers and that Scott is not an officer of First Central.

Plaintiff argues that 1141 Realty's undisputed failure to pay off the principal of either note on November 1, 2010, together with its production of the above mentioned loan documents, proof of the assignments, proof of the default, and demonstration as to why there is no merit to the affirmative defenses, entitles it to summary judgment against 1141 Realty as a matter of law.

Discussion

For the following reasons, plaintiff's motion for an order granting summary judgment, ordering foreclosure and judgment and sale, pursuant to RPAPL § 1351, and appointing a referee to determine the amount owed to plaintiff is granted.

Plaintiff has established prima facie entitlement to summary judgment in this foreclosure

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[5]1. The email states, inter alia, the following:
1.There remain one or more open Mechanic's Liens against the property; one of which is in the area of $1 Million +/-. This has precluded the bank from extending the two loans; both of which have matured as of November 01, 2010. "2010" is not a typo. * **
4. Although the loan payments have continued to be made even since the loan's maturity date, payments have been sporadic at best, and the loans have frequently run 60 to 90 days in arrears. Based on all of these matters we have determined that there is no other course of action available to the lender other than to commence a foreclosure action which has just begun . . . .
First Central [] needs to be replaced with a new lender. I will not agree to hold my foreclosure in abeyance while you seek to refinance, and given what we all collectively agree is a very valuable property, we will not consider accepting repayment of the debt other than in full. This now includes the addition of legal expenses associated with the foreclosure action.

action by presenting the mortgage and unpaid note, together with evidence of the default (*JPMCC 2007-CIBC 19 Bronx Apts., LLC v Fordham Fulton LLC*, 84 AD3d 613 [1st Dept 2011]; *Washington Mut. Bank, F.A. v O'Connor*, 63 AD3d 832, 833 [2d Dept 2009]; *CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224 [1st Dept 2006]; *LPP Mtge. Ltd. v Card Corp.*, 17 AD3d 103, 104 [1st Dept], *lv denied* 6 NY3d 702 [2005]).

Specifically, plaintiff submits evidence of the underlying obligations of 1141 Realty based on the mortgages securing the notes and of 1141 Realty's default in failing to comply with the terms of the notes which required that it make payments of, *inter alia*, principal and interest by the November 1, 2010 maturity date.

As plaintiff has established entitlement to summary judgment against 1141 Realty on its cause of action to foreclose, it is incumbent upon 1141 Realty to submit proof sufficient to raise a genuine issue of fact. As explained below, 1141 Realty's attempts to make this showing by asserting principles of waiver, estoppel and partial performance are unavailing.

1141 Realty's arguments must be viewed in the context of paragraphs 39, 41 and 42 of the mortgages. These paragraphs make it clear that, in order to effectuate a binding modification, extension or other change to the mortgage and notes concerning "the subject matter of the Loan Documents" or "the refinancing of any of the indebtedness," the parties must reduce their agreement to a writing, signed by an authorized officer of the mortgagee. This requirement conforms with the protections afforded in New York's statute of frauds, as codified in GOL§ 15-301, which require that a modification to a written contract be in writing, signed by the parties against whom enforcement is sought. It is not disputed that while the parties engaged in negotiations to further modify the loan documents and extend the maturity date prior to

November 1, 2010, they did not reach an understanding which was reduced to writing. To the extent 1141 Realty argues that Steven's May 25th letter and Scott's emails and July 1st payoff and loan statements constitutes a written agreement to modify the notes or to extend their maturity dates, the argument is unavailing.

As to the May 25th letter, it clearly states that both notes matured on November 1, 2010, and that the existence of mechanics liens on the property prevented extensions on the loans. As to Scott's communications, there is no evidence that he is an officer authorized to sign a modification or extension agreement on behalf of the bank. In any event, none of the communications contains language modifying or extending the maturity dates nor do they contain language from which such a modification or extension could be inferred. The communications merely state that First Central at the time calculated interest at the 9.25% rate, not that First Central was extending the maturity date indefinitely or waiving the default interest rate. Even if Scott's emails and July 1st payoff and loan statements are considered a modification, the terms of the payoff statement remained available until July 1, and 1141 Realty failed to accept or comply by that date or even within a reasonable time thereafter.

1141 Realty's reliance on First Central's acceptance of payments before and after November 1, 2010 at the regular interest rate of 9.25% as constituting a waiver its right to mandate strict compliance with the terms of the mortgages is equally unavailing.

It is well settled that:

> the acceptance of the additional monthly installments by [mortgagee] did not modify the express terms of the Mortgage so as to effect the waiver of [mortgagee's] right to additional interest payments and later charges. There was

> no intentional relinquishment by respondent of its known rights (*see, City of New York v State*, 40 NY2d 659, 669 [1976]). Indeed, without valid proof that the terms of the Mortgage were changed, or proof that any consideration has been paid for the alleged modification, no such modification can be inferred from the mere tender and acceptance of additional payments (*see, United States Trust Co. of N.Y. v Martindale Real Estate Co.*, 221 NY 677 [1917])"

(*Basciano v Toyet Realty Corp.*, 167 AD2d 203, 204-205 [1st Dept 1990] *see also Town of Hempstead v Incorporated Vil. of Freeport*, 15 AD3d 567, 569-570 [2nd Dept 2005]).

Moreover, New York courts routinely enforce unambiguous non-waiver clauses contained in mortgage documents, such as paragraphs 42's bar against "discussions, negotiations or oral statement by Mortgagee or between Mortgagor and Mortgagee with respect to the subject matter of any of the Loan Documents, or . . . the refinancing of any of the Indebtedness . . . [from] creat[ing] a binding obligation on Mortgagee," unless they are reduced to a duly signed writing (*Rosenzweig v Givens*, 62 AD3d 1, 7 [1st Dept], *affd* 13 NY3d 774 [2009]). "[W]here, as here, the alleged oral modifications are directly contradicted by the unambiguous terms of the parties' agreements which preclude any oral modification, the writing controls" (*Bank of Smithtown v Boglino*, 254 AD2d 319, 320 [2nd Dept 1998]; *see Rose v Spa Realty Assoc.*, 42 NY2d at 343).

Next, it is undisputed that First Central elected not to declare 1141 Realty in default following its failure to pay the principal on the maturity date and several earlier breaches. Despite its prior forbearance, by including non-waiver language in the mortgages, such as the failure to insist on strict performance shall not be deemed a waiver, plaintiff retained the option of declaring a default and seeking foreclosure (*CrossLand and Sav. v Loguidice-Chatwal Real Estate Investment* Co., 171 AD2d 457 [1st Dept 1991]; *Awards.com v Kinko's, Inc.*, 42 AD3d

178, 188 [1st Dept 2007], lv dismissed, 9 NY3d 1025 [2008]). Unlike *Nassau Trust Co. v Montrose Concrete Prods. Corp.* (56 NY2d 175 [1982]), where the defendant mortgagor supported its affirmative defense of waiver by presenting evidence of the plaintiff bank's agreement to waive a default in payment and to grant defendant a period of time in which to complete a closing of a sale of the mortgaged property, 1141 Realty has failed to establish, through probative evidence, rather than conclusory statements, that plaintiff intentionally and prospectively waived its right to enforce the terms of the mortgage/notes (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]; *Town of Hempstead v Incorporated Vil. of Freeport*, 15 AD3d at 569).

1141 Realty's reliance on the doctrine of estoppel is equally unavailing. "Once a party to a written agreement has induced another's significant and substantial reliance upon an oral modification, the first party may be estopped from invoking the statute [of frauds] to bar proof of that oral modification" (*see Rose v Spa Realty Assocs.*, 42 NY2d at 344). To establish estoppel, 1141 Realty must demonstrate that First Central made a clear and unambiguous promise, that it was reasonable and foreseeable that 1141 Realty would rely on that promise, and that it sustained an injury as a result of its reliance (*see Braddock v Braddock*, 60 AD3d 84, 95 [1st Dept 2009]; *Williams v. Eason*, 49 AD3d 866, 868 [2nd Dept 2008]). Additionally, "the conduct relied upon to establish estoppel must not be otherwise compatible with the parties' written agreement" (*see Rose v Spa Realty Assocs.*, 42 NY2d at 344), and "the requirement of a clear and unambiguous promise cannot be met by reference to a course of conduct between them"(*see Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., N.Y., Inc.*, 35 Misc 3d 1228 (A) *5, 2012 NY Slip Op 502921 [U] [Sup Ct, Suffolk County, 2012], citing

Southern Fed. Sav. and Loan Assn. of Georgia v 21–26 East 105th St. Assoc., 145 BR 375, 383 [SD NY 1991], *affd* 978 F2d 706 [2d Cir 1992]). Moreover, unsubstantiated, vague and conclusory allegations of an oral modification of a written agreement are insufficient to estop plaintiff from foreclosing on an overdue mortgage (*Prudential Home Mtge. Co. v Cermele*, 226 AD2d 357, 357-358 [2d Dept 1996]).

1141 Realty has not established a clear and unambiguous promise, either by word or deed, nor has it established that the conduct on which it relied was incompatible with the terms of the mortgages. 1141 Realty's contention is based on Mei's affidavit that it was reasonable to infer First Central made a clear promise to extend the maturity date indefinitely, from the parties' history, practice and course of conduct and from an alleged representation by an unidentified representative from First Central to an unidentified representative of 1141 Realty that no default interest rate would be declared. It was not reasonable to infer an unambiguous promise from First Central's acceptance of continued payments at the 9.25% rate, the lack of declaration of default, or the emails or letters, as First Central's conduct and communications were consistent with other explanations as discussed below. (See *Southold Savings Bank v Cutino,* [118 AD2d 555 (2d Dept. 1986)]. Moreover, First Central's actions and communications were not incompatible with the terms of the loans, as the mortgages contain no provision prohibiting such conduct or providing that such conduct was otherwise incompatible with any of their terms. As to Mei's statement regarding an alleged representation that no default interest rate would be declared, this statement is without probative value as it is unsubstantiated, lacks specificity, is conclusory and constitutes hearsay. To the extent 1141 Realty contends that a promise can be inferred from a course of conduct, as noted above, such conduct insufficient

under the law to meet the requirement of a clear and unambiguous promise *(see Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., N.Y., Inc.*, 35 Misc 3d 1228 (A) *5).

Finally, to the extent that 1141 Realty relies on part performance to forestall summary judgment, this doctrine is also unavailable to defendant to overcome the clear terms of the mortgages and the statute of frauds.

"In an appropriate case a court of equity may indeed give effect to an otherwise unenforceable oral contract where there has been part performance (*see* General Obligations Law, sec. 5-703[4]) and the acts performed are 'unequivocally referable' to the agreement"(*Cunnison v Richardson Greenshields Sec.*, 107 AD2d 50, 54 [1st Dept 1985][internal citations omitted]). To establish that this doctrine applies, the party attempting to prove oral modification has the burden of showing that the acts at issue are unequivocally referable to the alleged oral agreement (*Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 237-238 [1999]; *Anostario v Vicinanzo*, 59 NY2d 662, 664 [1983]). If, however, such acts "are equally consistent with an explanation having a basis other than the alleged oral agreement, the part performance relied upon will not remove the agreement from the bar of the statute of frauds" (*Cunnison v Richardson Greenshields Sec.*, 107 AD2d at 54). The acts at issue must also be by the party attempting to prove the oral modification (*Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d at 237-238).

1141 Realty's contention that it opted to continue making payments, rather than paying off the loans by November 1, 2010, and to press forward with its efforts to make the property suitable for use as a hotel based upon the lack of a formal demand for repayment and of a

declaration of default; Scott's emails; First Central's debiting of interest payments from 1141 Realty's accounts at 9.25% and issuing loan payoff statements calculated at 9.25%; and First Central's acceptance of interest payments after November 1, 2010, calculated at 9.25%, do not demonstrate part performance. In order to be unequivocally referable to the alleged oral agreement to extend the maturity date indefinitely, the parties' conduct must be inconsistent with any other explanation (*see Richardson & Lucas, Inc. v New York Athletic Club of City of N.Y.*, 304 AD2d 463, 463 [1st Dept 2003]; *see also Rose v Spa Realty Assoc.*, 42 NY2d at 343). Specifically, here, 1141 Realty's conduct is not inconsistent with other explanations such as 1141 Realty having an opportunity to become current and to seek refinancing. Notably, it is not sufficient that the oral agreement gives "significance" to defendants' actions. Instead, the actions alone must be "unintelligible or at least extraordinary" and explainable only with reference to the oral agreement (*Anostario v Vicinanzo*, 59 NY2d at 664).

Accordingly, in the absence of evidence, documentary or otherwise, to support these defenses, 1141 Realty cannot overcome the express provisions of the notes prohibiting oral modification and the statute of frauds, and Flatiron Notebuyer as assignee and owner of the mortgage and notes, is entitled to foreclosure.

Likewise,1141 Realty's arguments that plaintiff waived the right to collect default interest from November 1, 2011 through the date of the August, 2011 acceleration letter is without merit. 1141 Realty argues that Brick Capital's "unilateral decision to reject payments... was clearly motivated by First Central's assignment of the First and Second Mortgages to Brick Capital. It was a wrongful act designed to allow the assignee, Brick Capital, to collect default interest it simply is not entitled to. The fact remains, even if a default occurred, the default was cured and the right to sue waived in writing by First Central's officers." First, 1141 Realty's contention that if a default occurred, it was cured, is unsupported by the facts or by law. Specifically, it is

undisputed that 1141 Realty failed to pay off the notes upon maturity or any time thereafter. For the same reasons that Steven's May 25th letter, and Scott's emails do not constitute a modification or change of the notes, they do not constitute a waiver of plaintiff's right to collect default interest. Moreover, there is no waiver of default interest since paragraph 41 contains a provision that explicitly states that the failure to exercise an available right would not constitute a waiver of such right. (*Ekelmann Group v Stuart,* 108 AD3d 1098 [4th Dept. 2013]).

As to1141 Realty's cross motion, at the outset, I note that this cross motion is in essence an attempt to reargue this motion after submission, is procedurally improper, and will not be considered. Even if it were to be considered, the cross motion would be denied in light of the above determination granting summary judgment.

With respect to plaintiff's request for the appointment of a receiver, the parties dispute whether a receiver is necessary for the preservation of the premises. At the time of submission of the motion, plaintiff argued that because 1141 Realty had been unable to timely complete its renovation project, to make timely payments to its vendors or to service and/or refinance its debt, the appointment of a receiver was warranted. Next, plaintiff quoted language in the mortgages which authorizes such appointment. Under New York law, even where the appointment is authorized under the mortgages, the court retains the authority, in its discretion, to deny the appointment of a receiver where appropriate (*see Clinton Capital Corp. v One Tiffany Place Developers*, 112 AD2d 911, 912 [2nd Dept 1985]; *Ridgewood Sav. Bank v New Line Realty VI Corp.*, 24 Misc 3d 1227 [A], 2009 NY Slip Op 51646[U], *3 [Sup Ct, Bronx County 2009]). Here, since I am granting summary judgment and ordering foreclosure and sale, absent compelling circumstances, the motion to appoint a receiver is denied.

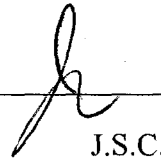
That portion of the motion seeking summary judgment against defendants Forge Enterprises, Inc. ("Forge") and Flatiron Hotel, when viewed in the context of the complaint

which contains only two causes of action, each to foreclose, is granted. The opposition submitted by Forge and Flatiron does not raise any material issues precluding summary judgment in plaintiff's favor. Forge, a lien holder, concedes its lien is subordinate to that of plaintiff's first mortgage and seeks only to sever its cross claims against defendant Born to Build, which motion is granted.[6] Flatiron Hotel's papers do not address its interest, if any, in the premises. Its papers consist of an attorney's affirmation and are limited to contentions more properly raised by 1141 Realty, and, thus are of no probative value.

Plaintiff also moves for a default judgment against the following non-answering defendants, Main Team Hotel LLC, Ming Chu Company Ltd., Smart Apartments LLC, The City of New York Environmental Control Board, Ekistics Development Corp., Polar Bear Cooling, Inc., and Kambanis Architect PLLC.[7] The complaint alleges that Main Team Hotel LLC, Ming Chu Company Ltd., and Smart Apartments LLC, are guarantors and that the remaining defendants are lien holders. In the context of this action to foreclose, there is no basis as a matter of law to deny plaintiff summary judgment as to these defendants.

Settle order on notice.

Dated: September 24, 2013



J.S.C.

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[6]Forge's cross claims against co-defendant Born to Build assert claims for breach of contract in connection with work it performed on the premises. Its pleadings also asserts as a "cross claim counterclaim" a claim for lien foreclosure seeking a determination of priorities and equities and claims and the validity of its lien, foreclosure of its lien, sale of the premises and payment in connection with its lien from the proceed of the sale.

[7]Plaintiff originally sought a default judgment against defendants Motel U.S.A., Inc. and T-Mobile Northeast, LLC. Subsequently, plaintiff moved to discontinue as to these two defendants and this relief is granted.