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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA PART 39
Justice

Index Number : 101283/2010
AMALGAMATED BANK
vs.
FORT TRYON TOWER SPE LLC
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

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 6/6/14
which disposes of motion sequence(s) no. 006 and 007.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 6/4/14 5/23/14

39
_____, J.S.C.
HON. SALIANN SCARPULLA

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: IAS PART 39

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PETRA MORTGAGE CAPITAL CORP., LLC and PETRA CRE CDO 2007-1, LTD.,

Plaintiffs,

-against-

AMALGAMATED BANK, as Trustee of Longview Ultra I Construction Loan Investment Fund,

Defendant.

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DECISION/ORDER
Index No. 651861/10

(Action # 1)

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

Plaintiffs

-against-

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

Index No. 101283/10

(Action # 2)

CAPTION CONTINUES ON NEXT PAGE

mortgaged premises described in the complaint and lessees, tenants, occupants and other persons and entities who may be in possession of portions of the mortgaged premises described in the complaint,

Defendants.

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ALL ROCK CRUSHING, INC.,

Plaintiff,

-against- Index No. 100618/09

FORT TRYON SPE, LLC, MARSON CONTRACTING CO., INC., AMALGAMATED BANK, as Trustee of Longview Ultra I Construction Loan Investment Fund, AS AGENT, PETRA MORTGAGE CAPITAL CORP. LLC, RUTHERFORD H. THOMPSON III, et al., (Action # 3)

Defendants.

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HON. SALIANN SCARPULLA, J.:

These actions stem from a real estate loan which originated in 2007, for the construction of a new residential building in Washington Heights, Manhattan. In the first action, *Petra Mortgage Capital Corp. LLC and Petra CRE CDO 2001-1, Ltd. v. Amalgamated Bank, as Trustee of Longview ULTRA I Construction Loan Investment Fund*, Index No. 651861/2010, ("action no. 1"), plaintiffs Petra Mortgage Capital Corp. LLC ("Petra") and Petra CRE CDO 2007-1, Ltd ("Petra CDO") (collectively "plaintiffs") move, pursuant to CPLR 3001 and 3212 (e), for partial summary judgment on their fourth cause of action, which seeks a declaratory judgment that defendant Amalgamated Bank ("Amalgamated"), as Trustee of Longview Ultra I Construction Loan Investment Fund ("Longview"), will be obligated to pay plaintiffs certain sums provided for under the guarantee set forth in the Intercreditor Agreement ("ICA"), described below, and

dismissing Amalgamated's affirmative defenses which apply to plaintiffs' fourth cause of action – the sixth, seventh, and ninth through twelfth affirmative defenses. (Motion sequence no. 008.) Those affirmative defenses allege, respectively, that plaintiffs: breached the ICA, breached the implied covenant of good faith and fair dealing, received all the benefits to which they were entitled under the ICA, are not entitled to declaratory judgment because the contractual requirements pertaining to the guaranty have not been met, are not entitled to judgment because they seek damages in an amount not provided for in the ICA, and lack standing to bring their claims.

Amalgamated also moves, pursuant to CPLR 3021, to compel discovery. (Motion sequence no. 009.)

In the second action, *Amalgamated Bank, as Trustee of Longview Ultra I Construction Loan Investment Fund (now known as Longview Ultra Construction Loan Investment Fund), individually and as agent for itself and the other Lenders signatory thereto including Petra Mortgage Capital Corp. LLC as Co-Lender v. Fort Tryon Tower SPE LLC, Marson Contracting Co., All Rock Crushing, Inc., Liberty Mechanical Contractors LLC, Tectonic Engineering and Surveying Consultants, P.C., S.J. Electric, Inc., MG Engineering, P.C., Rutherford Thompson III, et al.*, Index No. 101283/2010 ("action no. 2"), defendants Fort Tryon Tower SPE LLC ("Fort Tryon") and its principal, Rutherford Thompson ("Thompson"), move to strike the note of issue and statement of readiness and, pursuant to CPLR 3124, to compel further discovery. This Court (J. Kapnick) denied that branch of the motion that seeks to strike the note of issue, for the reasons stated on the record on October 7, 2013. (Motion sequence no. 006.)

In addition, Amalgamated moves for summary judgment on its first and second causes of action, which seek, respectively, an order foreclosing on mortgages given by

Fort Tryon and an order for a deficiency judgment against Fort Tryon and Thompson, and dismissing the counterclaims alleged by Fort Tryon and Thompson. The court notes that only the first and second counterclaims alleged in the amended verified complaint are alleged against Amalgamated.[1] Fort Tryon and Thompson cross-move for: (1) summary judgment on their first counterclaim for declaratory judgment, declaring (a) that Amalgamated's claims that the terms of the loans that are the subject of this action have expired and that the principal amounts of the loans are now due and payable, are without merit; (b) Fort Tryon is not in default of its obligations under the loans; and (c) Amalgamated is obligated to resume funding and disburse construction advances for the completion of the project; (2) summary judgment on Fort Tryon's second counterclaim for specific performance ordering Amalgamated to fund the remaining balance of the loans necessary to complete the project; and (3) dismissing Amalgamated's action for foreclosure and a deficiency judgment. (Motion sequence no. 007.)

Amalgamated also purports to move for summary judgment on its affirmative defenses and cross claims, and for dismissal of all claims and cross claims asserted by other parties in a third action, *All Rock Crushing, Inc. v. Fort Tryon Tower SPE, LLC, Marson Contracting Co., Amalgamated Bank, as Trustee of Longview Ultra I Construction Loan Investment Fund, as agent, Petra Mortgage Capital Corp. LLC, Rutherford H. Thompson III, et al.* Index No. 100618/2009, ("action no. 3"). In addition, Fort Tryon and Thompson seek summary judgment dismissing the complaint against them by All Rock Crushing, Inc. ("All Rock"), and terminating the mechanic's lien alleged therein. However, there are no separate notices of motion or cross motion in action no. 3,

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[1] The amended answer was served after this court's order, dated December 16, 2011 (the "Order"), which dismissed the first through the fourth, and the proposed seventh, counterclaims.

and as the Court (J. Kapnick) noted on the record on October 7, 2013, even though Amalgamated and Fort Tryon put both index numbers on their papers, "you can't make the same motion in two cases . . . . [T]here is no motion officially in the All Rock case." In the interest of judicial economy, these will be treated as a properly filed motion and cross motion, and will be discussed below.

Motion sequence nos. 008 and 009 in action no. 1, motion sequence nos. 006 and 007 in action no. 2, and Amalgamated's request for summary judgment on its affirmative defenses and cross claims, and for dismissal of all claims and cross claims asserted by other parties, and Fort Tryon's and Thompson's cross motion for summary judgment in action no. 3 are consolidated for disposition.

Background

On June 15, 2007, Petra and Amalgamated entered into certain agreements to lend up to $95 million to Fort Tryon. Fort Tryon intended to use the funds to develop a luxury high-rise mixed-use condominium on 184th Street and Fort Washington Avenue in Manhattan, and to perform certain construction work on the adjacent Fort Tryon Jewish Center. On the same day, Petra and Amalgamated also entered into the ICA, which sets forth their respective rights and obligations in relation to the loan. Under the ICA, Amalgamated was designated "administrative agent" for itself and for Petra, and "Lead-Lender." Petra, designated "Co-Lender," held Note A-2 and was obligated to fund up to $50 million of the loan "[u]pon Lead Lender's determination that Lender [Amalgamated and Petra, jointly] is obligated to fund the loan." The ICA provides that Petra was to fund the first $30 million of the loan, Petra and Amalgamated were to fund the next $40 million on a pro-rata basis, and Amalgamated was to fund the remaining $25 million, if

drawn. Amalgamated had the primary authority to administer the loan and to enforce the associated notes and mortgages.

Section 2-e of the ICA, the guaranty upon which Petra relies, provides, in relevant part, that

> Provided Co-Lender has complied with the terms of this Agreement, including without limitation its obligation to make advances hereunder, Lead Lender agrees to guarantee to Co-Lender repayment of the Guaranteed Amount following a determination by Lead Lender and Co-Lender, each exercising their reasonable discretion, that there has been a recovery of all Liquidation proceeds and other payments or recoveries that Co-Lender and Lead Lender have reasonably determined will be ultimately recoverable following an Event of Default and acceleration of the Loan.

"Guaranteed Amount" is defined as:

> an amount equal to the Note A-2 Principal Balance up to the maximum amount of $45,000,000, less the sum of (a) all payments of any type applied to the repayment of the principal portion of Note A-2 actually received by Co-Lender, (b) all amounts previously advanced by Lead Lender and (c) all unreimbursed Costs up to $200,000 in the aggregate and Advances paid or incurred by Lead Lender.

The loan to Fort Tryon closed on or about June 15, 2007, with an initial advance paid by Petra. Amalgamated forwarded funding requests nos. 2 through 16 to Petra, from July 23, 2007 to September 23, 2008, all of which Petra paid in the required amount. On May 27, 2009, Amalgamated faxed Petra a notice for funding unpaid insurance premiums on the property. Petra responded the same day, stating that it was preparing to fund, but that "[t]here were issues previously with mechanic's liens on the property. Will this premium funding maintain a first lien position?" Amalgamated wrote back, stating "I have ordered a title continuation for tomorrow's funding. I will let you know if and when we receive clear Title so we can proceed with funding." The following day, Amalgamated wrote

> Please be advised that we have received the title endorsement for the [F]ort Tryon project and there are numerous [m]echanic's lien[s] on the property.

> Please hold off from sending your portion of the advance until further notification.

Subsequently, Amalgamated notified Petra of three further protective advances that Amalgamated would make, and inquired whether Petra would share in funding them. Amalgamated noted that, pursuant to the ICA, Petra had "the right, but not the obligation, to advance its pro rata share of such protective advances." Petra chose not to participate in funding those advances. By letter to Fort Tryon, dated August 19, 2009, Amalgamated declared an event of default. By that time, Petra had advanced more than $30 million on the loan, and Amalgamated had advanced approximately $2 million. Amalgamated commenced a foreclosure action (action no. 2) on January 29, 2010.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

In action no. 2, Amalgamated moves for summary judgment on its first and second causes of action for foreclosure of the mortgage note, and to dismiss Fort Tryon's and Thompson's counterclaims against it on the grounds that Fort Tryon allowed certain events of default to occur. Amalgamated contends that the events of default consisted of Fort Tryon's failure to make a maturity date payment on June 30, 2009, failure to timely pay property taxes and insurance premiums in 2009, and allowance of four mechanic's liens to be recorded against the property, by, respectively, All Rock, Marson Contracting Co. ("Marson"), Liberty Mechanical Contractors, P.C., and Tectonic Engineering and

Surveying Consultants, P.C. In opposition, Fort Tryon argues that its default was triggered by Amalgamated's failure to fund its draw request, and plaintiffs therefore may not rely on the defaults to foreclose on the mortgage note.

This court (J. Kapnick), in its December 16, 2011 Order (the "2011 Order"), held that Amalgamated may not rely upon the All Rock lien to show a default on the part of Fort Tryon. The other liens Amalgamated alleges constituted events of default were recorded no earlier than December 2008, after the last advance was paid.

It is undisputed that Amalgamated paid no advances to Fort Tryon after September 30, 2008. Moreover, Amalgamated's project manager for the Fort Tryon project certified on September 8, 2008 that "all requirements for the draw have been met," and, that as of that date, there was no event of default. Pursuant to the Building Loan Agreement, for a draw to be funded, one of the "requirements" was that there be no "event of default." In addition, another Amalgamated employee, Adam Landenwitch, made a certification on September 30, 2008, that he had "reviewed the draw request, the enclosures and determined that the loan is in balance and all requirements for the draw have been met." It is also undisputed that, pursuant to the loan documents, Fort Tryon was barred from seeking financing from any other source, and that Amalgamated knew that Fort Tryon's ability to repay the loans was dependent upon the sale of the envisioned condominium apartments.

Amalgamated argues that Fort Tryon did not submit a draw request after its 16th request. Fort Tryon, however, provides evidence that it submitted a 17th draw request, and it is undisputed that Amalgamated failed to pay it. An October 29, 2008 memorandum from ULTRA staff, addressed to the LongView ULTRA Construction Loan Investment Fund Investment Committee, lists among several proposals, that

"ULTRA will fund the pending draw requests." Inasmuch as the 16th draw request was funded on September 30, 2008, the "pending draw requests" referred to in the October memorandum was for an additional, 17th request. Similarly, a September 25, 2008 e-mail from Stephen Nugent of Amalgamated, which copied Nisson, acknowledges that the 17th draw request had been made. Nugent's email states: "I've already processed Draw #16 . . . . At this point it doesn't make any sense to combine #16 and #17 as #16 is virtually done." Nisson responded "I asked [Thompson] to combine draws so they would get done once [he] spoke to them. I can't go to committee until [O]ctober and I need them to fund until then at least if not longer."

Subsequently, in an October 22, 2008 email to Thompson, Nisson refers to "draws" for construction work that was already done, the payment of which she was inclined to recommend. Fort Tryon submitted a so-called "pencil" requisition for draw no. 17.[2] Amalgamated argues that this document "was not an actual or proper draw request" because it lacked the supporting documentation required by the loan documents, but that contention is not based upon any fact in the record. In any event, as this Court (J. Kapnick) previously noted in the December 16, 2011 Order, the loan agreements expressly provide that any provision set forth in them can be waived by Amalgamated.

Accordingly, even if the documentation that Fort Tryon submitted in support of a 17th draw request did not have the required support, the evidence submitted shows that the Amalgamated personnel responsible for addressing draw requests treated Fort Tryon's documents as a proper 17th request, thereby indicating that Amalgamated waived the

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[2] In his affidavit in support of the cross motion, Thompson explains the draw process: "Fort Tryon would submit a 'pencil' requisition for the costs for work completed. This penciled version would then be reviewed by Amalgamated and its consultants, and then returned. When returned, Fort Tryon would then submit the formal or final draw application."

supporting documentation requirement. Nor has Amalgamated refuted that Fort Tryon had, at least, provided sufficient documentation in its initial request to require Amalgamated to work on the request and to return it to Fort Tryon so it could make a full, formal request. Amalgamated has presented no evidence to contradict Fort Tryon's *prima facie* showing that it presented enough of a 17th draw request to require Amalgamated to at least move toward a finalization of that request and that Amalgamated failed to do so.

In the fall of 2008, Petra was experiencing financial difficulties and sought to have Amalgamated assume responsibility for Petra's remaining funding obligations. Amalgamated acknowledged, however, that regardless of Petra's ability (or lack thereof) to continue funding the construction project, Amalgamated was obligated to continue funding its contractual share of such costs. Thus, in a December 9, 2008 memorandum addressed to the chairman of Amalgamated's board of directors, Fierce noted that "[a]lthough ULTRA is not obligated to pay Petra's future fundings, ULTRA is obligated to fund the maximum amount committed to the project of $45 million." Fierce also noted that, at that time, ULTRA outstanding balance was $1,034,566.09.

Moreover, although Amalgamated continued to fund protective advances, as well as interest payments to itself and to Petra, it funded no construction advance after the 16th advance. Because Fort Tryon was barred from seeking financing from other sources, once Amalgamated stopped paying advances to Fort Tryon, subcontractors who had already performed the work referred to in Nisson's October 22, 2008 email filed mechanic's liens. Without the construction advances Fort Tryon would be unable to finish construction and to repay the loans.

As stated in the 2011 Order, "[i]t has long been established that '[a] promisee who prevents the promisor from being able to perform the promise can not maintain suit for

nonperformance; he discharges the promisor from duty.'" Citing *Canterbury Realty & Equip. Corp. v. Poughkeepsie Sav. Bank*, 135 A.D.2d 102, 107 (3d Dep't 1988) (quotation marks and citations omitted). Accordingly, because the so-called defaults upon which Amalgamated relies were caused by Amalgamated's halt in processing and paying advances, Amalgamated's motion for summary judgment on its cause of action for foreclosure is denied.

Additionally, for the same reasons, Fort Tryon's and Thompson's cross motion for dismissal of Amalgamated's action for foreclosure and a deficiency judgment is granted, and the portion of Fort Tryon's and Thompson's motion to compel further discovery is denied as moot.

The guaranty, which is the subject of Amalgamated's second cause of action for a deficiency judgment against Fort Tryon and Thompson, is an irrevocable guaranty of payment by Fort Tryon of "the Total Debt" in accordance with the terms and conditions of the Loan Agreement." The Building Loan Agreement defines "Total Debt" as "collectively, the Debt and Other Debts." "Debt" is defined as "the outstanding principal amount of the Building Loan together with all interest accrued and unpaid thereon . . . , " and "Other Debt" is defined as "collectively, the 'Debt,' as defined in each of the Senior Loan Agreement and the Project Loan Agreement." As such, Thompson's guarantee extends no further than Fort Tryon's indebtedness to Amalgamated and Petra. As Amalgamated has failed to establish that Fort Tryon is in default of its debt to Amalgamated and Petra, Amalgamated's motion for summary judgment with regard to the second causes of action is also denied.

In addition to their cross motion for dismissal of the mortgage foreclosure action, Fort Tryon and Thompson also cross-move for summary judgment on their first

counterclaim for declaratory judgment, and on Fort Tryon's second counterclaim for specific performance ordering Amalgamated to fund the remaining balance of the loans necessary to complete the project.

Both the Building Loan Agreement and the Project Loan Agreement, each dated June 15, 2007, provide that

> Subject to and upon the terms and conditions set forth herein, Agent [Amalgamated] agrees to make on behalf of Lenders [Amalgamated and Petra] . . . Advances of the [loan that is the subject of each agreement], in an aggregate principal amount not to exceed the [amount provided for in each agreement] in the aggregate. No Lender is obligated to fund amounts in excess of the amount of its Maximum Commitment.

Each of these agreements defines "Maximum Commitment" as:

> the obligation of the Agent to fund advances of the [subject] Loan to Borrower on behalf of Each Lender . . . in an aggregate principal amount at any one time outstanding not to exceed the amount set forth in each . . . Loan Note payable to such Lender, as such amount may be modified from time to time.

Amalgamated, as lender, is not obligated to fund advances beyond the sum of the loan notes payable to it, plus such sums as Amalgamated, as agent, paid it in interest on the loans from October 30, 2008 to the present. However, Amalgamated, as agent, is obligated to continue to disburse advances on the aggregate principal amount of the loans to Fort Tryon. As discussed above, Amalgamated failed to fund the 17th request, in violation of its obligation to do so.[3] Accordingly, Fort Tryon's motion for summary judgment on its first counterclaim for a declaratory judgment is granted.

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[3] It bears noting that, while Petra is a signatory to both the Building Loan Agreement and the Project Loan Agreement, it not a party to the agreements, but is identified as a lender for which Amalgamated is to act as the administrative agent. The loan agreements are contracts between Fort Tryon and Amalgamated, as administrative agent, and nothing in either of the loan agreements conditions Amalgamated's obligations, as agent, upon any action on the part of Petra.

Fort Tryon also moves for summary judgment on its second counterclaim for specific performance compelling Amalgamated to provide funding for the remaining balance of the loan amounts. Specific performance is an equitable remedy that is appropriate where money damages would be inadequate, because the breach for which damages are sought concerns a unique object or parcel of land, or for other reasons. *See generally Cho v 401-403 57th St. Realty Corp.*, 300 AD2d 174, 175 (1st Dept 2002). "In general, specific performance will not be ordered where money damages 'would be adequate to protect the expectation interest of the injured party.'" *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 415 (2001) (quoting Restatement [Second] of Contracts § 359 [1]).

"Because money is fungible, a party seeking enforcement of an agreement to lend money would be expected to borrow money elsewhere and recover damages based on the higher costs associated with the replacement loan. Nevertheless, exceptions to the general rules exist. . . . [S]pecific performance has been awarded where the subject matter of a particular contract is unique and has no established market value." *Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp.*, 69 A.D.3d 212, 217 (4th Dep't 2009) (internal quotation marks and citations omitted). Moreover, "'cases of construction mortgages are an exception' to the general rule. 'Since the law regards land as unique[,] an agreement to buy land can be specifically enforced even though the defendant's sole obligation is to pay money . . . . Although the question is close, it may not be too great a stretch to include advances under a construction mortgage.'" *Id.*, quoting *Southampton Wholesale Food Term. v Providence Produce Warehouse Co.*, 129 F Supp 663, 664 (D. Mass. 1955). "In such circumstances, the 'agreement . . . is not a simple contract to lend money. It is an integral part of a contract to sell [or develop] real

property.'" *Id.* at 220-221 (quoting *Bregman v. Meehan*, 125 Misc. 2d 332, 347 (Sup. Ct. Nassau Co. 1984)).

Here, Fort Tryon has established that a particular parcel of land is at issue, upon which significant work has already been done, and, in connection with which, easements and governmental approvals have been obtained. Fort Tryon has therefore established prima facie entitlement to summary judgment on its claim for specific performance.

In opposition, Amalgamated maintains that Fort Tryon's reliance on *Destiny USA Holdings* is misplaced, because that case involved a lender refusing to pay a properly submitted draw request, and Fort Tryon cannot show that Amalgamated breached the loan agreement, because Fort Tryon did not submit any proper draw request that Amalgamated failed to fund. However, as discussed above, I find that the evidence submitted shows that Fort Tryon, at a minimum, initiated the 17th request, and that Amalgamated was required to at least move toward a finalization of that request, and which Amalgamated failed to do. Accordingly, an order of specific performance is appropriate.

In action no. 1, Plaintiffs seek a declaration that: "following a determination by Plaintiff[s] and Defendant that there has been a recovery of all proceeds, payments or recoveries reasonably determined to be recoverable after an Event of Default or acceleration of the Loan, Defendant is obligated under the Guaranty to repay Plaintiff[s] the amounts funded by Plaintiff[s] that [they] have not been repaid from such proceeds." (Motion Seq. No. 008.). As I have dismissed Amalgamated's action for foreclosure, this motion must be denied, without prejudice.

Plaintiffs also move to dismiss Amalgamated's sixth, seventh, ninth, tenth, eleventh and twelfth affirmative defenses. On a motion to dismiss affirmative defenses, "the plaintiff bears the burden of demonstrating that [such] defenses are without merit as

a matter of law. In deciding a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed." *534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541-542, (1st Dept. 2011) (internal citations omitted).

The sixth affirmative defense alleges breach of contract. In its amended answer, Amalgamated "avers that Plaintiffs' ultimate compliance with the terms of the ICA can only be determined upon completion of the foreclosure process and all other acts and proceedings contemplated by the ICA." As the foreclosure action has been dismissed, and pursuant to this decision and order, Amalgamated must continue funding the project, moving to dismiss this affirmative defense is denied as premature.

The seventh affirmative defense, alleges breach of the implied covenant of good faith. In *ABN Ambro Bank, N.V. v MBIA Inc.*,17 NY3d 208 (2011), upon which Amalgamated relies, the Court held that plaintiff's allegation that, by fraudulent transfers to the defendant, MBIA Insurance had "'substantially reduc[ed] the likelihood that [it would] be able' to meet its obligations under the terms of [its] policies," stated a claim for violation of the implied covenant. *ABN*, 17 N.Y.3d at 228-229 (quoting *ABN Ambro Bank, N.V.*, 81 AD3 237, 254 (1st Dept 2011) (Abdus Salaam, J., dissenting in part)). There, at the time that the action was commenced, multiple policies that had been issued by MBIA Insurance remained in effect. Here, by contrast, it is undisputed that Petra had sufficient funds to meet its contractual obligations until Amalgamated decided to stop funding Fort Tryon, for reasons having nothing to do with Petra, and that, thereafter, Petra had no obligation to fund. Accordingly, the seventh affirmative defense is dismissed.

The ninth affirmative defense alleges that "[P]laintiffs have received all benefit and/or consideration to which they are entitled under the ICA." Plaintiffs argue that this

affirmative defense should be dismissed because Petra has not received any of the Guaranteed Amount due to it under the Guaranty, and therefore has not received all the benefits and/or consideration to which it is entitled. Amalgamated does not address this argument, ths the ninth affirmative defense is dismissed without opposition.

The tenth affirmative defense, which alleges that the contractual requirements pertaining to the guaranty have not been met, is also denied as premature for the reasons stated above. The eleventh affirmative defense, which alleges that plaintiffs seek damages in an amount not provided for in the ICA is a reason to tailor the judgment to the damages provided for in the ICA, but is not a reason to deny plaintiffs judgment, and therefore is dismissed.

Finally, the twelfth affirmative defense, that plaintiffs lack standing, is also dismissed. Amalgamated's challenge to plaintiffs' standing also fails. The documentary evidence shows that, after the loan closed in June 2007, Petra assigned all of its rights, title and interest in the loan to its affiliate Petra Fund Reit Corp. ("REIT"). Petra, as co-originator of the loan with Amalgamated, held all claims accruing between the closing of the loan and the assignment to REIT. REIT subsequently assigned its interest in the ICA in an assignment and assumption agreement, to Petra CDO, and pledged its interest to nonparty Greenwich Capital, pursuant to section 12 (b) of the ICA. That section provides, in relevant part:

> Co-Lender shall have the right to transfer all or any portion of Loan A-2 or any interest therein to a Co-Lender Pledgee (as hereinafter defined). Notwithstanding any other provision hereof, Lead Lender consents to Co-Lenders pledge which for the purposes hereof shall include a transaction governed by a repurchase agreement (a Co-Lender Pledge) of Loan A-2. . . . Upon written notice by Co-Lender to Lead Lender that a Co-Lender Pledge has been effected, Lead Lender agrees to acknowledge receipt of such notice. . . .

Petra served a notice of pledge (undated) on Amalgamated, which stated, in part, "[t]his correspondence constitutes notice to you that the Pledge has been entered into with [Greenwich Capital] in accordance with the requirements of Section 12(b) of the [ICA]." Amalgamated executed an (undated) acknowledgment of receipt of the notice of pledge. The pledge provides that Greenwich "shall not be deemed to have assumed any obligations of [REIT] under the Loan Documents except to the extent necessary in order to satisfy any conditions set forth in the Loan Documents." Accordingly, Petra has standing because of rights accruing from the execution of the ICA to Petra's assignment of its rights to REIT, and Petra CDO has standing pursuant to REIT's assignment of its rights to it, which assignment was not negated by the pledge.

Also in action no. 1, Amalgamated seeks five categories of documents, as well as deposition testimony regarding those documents. The first two categories are: (1) documents material to Amalgamated's "defense against [Petra's] claim that the Loan's status was such that [Amalgamated] was required to take certain actions pursuant to the [ICA] that it did not take or did not take in a timely manner;" and (2) "responses to interrogatories seeking factual detail underlying [Petra's] claims that the Loan's status required [Amalgamated] to take certain actions that it did not take or did not take in a timely manner." The other three categories seek documents relevant to Amalgamated's defenses that Petra breached the ICA by disabling itself from performing its obligations thereunder, and that one or more plaintiffs lack standing.

Amalgamated's motion to compel is denied, as it lacks specificity as to precisely what is sought. Amalgamated's "supporting papers [are] inadequate because they fail[] to specify which interrogatories the [plaintiffs] allegedly failed to adequately answer, and

which documents the [plaintiffs] failed to produce." *Tenore v Kantrowitz, Goldhamer & Graifman, P.C.*, 76 A.D.3d 556, 558 (2d Dep't 2010).

Even were I to review the motion to compel on the merits, I would reach the same conclusion. To the extent that Amalgamated seeks discovery relevant to its affirmative defense that Petra committed a breach of the ICA in the form of repudiation, the motion is denied. Plaintiffs assert that they can not be compelled to produce documents relevant to an unpled affirmative defense. I need not address this, because it is plain that there is no viable repudiation claim here, and therefore no relevance to discovery sought to show whether Petra would have been able to fund an additional advance is not relevant.

Repudiation can take the form of either "'a statement by the obligor *to the obligee* indicating that the obligor will commit a breach . . . ' or 'a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.'" *Norcon Power Partners v Niagara Mohawk Power Corp.*, 92 NY2d 458, 463 (1998) (quoting Restatement [Second] of Contracts § 250) (emphasis added); *See also Computer Possibilities Unlimited v Mobil Oil Co.*, 301 AD2d 70, 77 (1st Dept 2002).

In support of their argument, Amalgamated submits the affidavit of James Freel ("Freel"), senior vice president of Amalgamated, as trustee of Longview. Freel states in his affidavit that in the fall of 2008, Petra representatives told Thompson that Petra was both unwilling and unable to continue funding the project. However, a statement made to a non-obligee does not constitute a repudiation, unless the obligor requests that the statement be repeated to the obligee. *Computer Possibilities*, 301 A.D.2d at 77; *Restatement [Second] Contracts* ¶ 250 (b) (4). Amalgamated does not contend that Petra made any such request.

Amalgamated also submits an affidavit from Deborah C. Nisson ("Nisson"), who was senior vice president and portfolio manager of Longview from 2005 until January 2010. Nisson states in her affidavit that in the fall of 2008, Petra representatives told her that Petra was unwilling to provide future funding for the loan. However, at her deposition, when Nisson was asked "Were you ever privy to a discussion to analyze or discuss whether Petra had possibly not complied with any of its obligations under the [ICA]," she answered "I don't recall." Nisson does attach as an exhibit to her affidavit, a July 7, 2009 e-mail that she wrote to Chet Davis, at Amalgamated, in which she stated, "I do not think that I have anything in writing from Petra regarding their refusal to fund future fundings because the communication was via telephone." Leaving aside Nisson's failure to quote what she claims to have been told, it is undisputed that in September 2008, Petra fulfilled its obligation with respect to draw request no. 16, and that thereafter, Amalgamated presented Petra with no further draw requests from Fort Tryon. Amalgamated takes the position, in both actions, that Fort Tryon made no further requests for advances. At his deposition, Freel testified that "[a]s I sit here today, I am not of the opinion that Petra has breached any aspects of the [ICA]," and, when asked specifically "[C]an you say . . . that Petra has complied with its obligation to make advances under the [ICA]," he replied "[t]o the best of my knowledge."

Amalgamated also argues that, by transferring funds to an affiliate, Petra disabled itself from performing its obligations under the ICA. However, Amalgamated alleges no obligation that Petra failed to perform because of a lack of funds, or for any other reason, and it is undisputed that Petra made every payment that it was required to make under the ICA, and, indeed, stood ready to participate in the September 28, 2008 protective advance. Greg Fierce ("Fierce"), Amalgamated's former senior vice president and its

head of commercial real estate from April 2007 until September 2010, testified at his deposition that he was not aware of any instance where Petra refused a funding request that Amalgamated had approved, and that the fact that Amalgamated stopped funding Fort Tryon had nothing to do with Petra. Amalgamated argues that, had it presented more draw requests to Petra, Petra might not have been able to fund them. At oral argument, counsel for Amalgamated stated that it could clearly be inferred that the reason why Fort Tryon made no request for an advance beyond the 16th is that Petra's principal told Thompson that Petra could not continue to fund the project. However, this alleged inference is insufficient, and Amalgamated cites no case, and this court knows of none, where a repudiation has been found on the ground that a party's actions *may* have disabled it from performing a hypothetical future duty.[4]

In *Computer Possibilities*, the case upon which Amalgamated most heavily relies, the plaintiff was required by its contract with the defendant to offer to sell a computer software program, that the defendant would endorse for use by its dealers, at prices not to exceed those specified in the contract. Thereafter, the plaintiff entered into a marketing and distribution agreement with another company, pursuant to which that company would control the prices at which the software program would be sold. The Court held that the plaintiff repudiated its contract with the defendant when it ceded control of the prices charged for the program, because from then on it could not fulfill its contractual duty to set the prices charged at no more than those set forth in the plaintiff's contract with the defendant.

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[4] Amalgamated's argument that Petra "failed to fund [the May 2009 protective advance] despite being asked to do so" ignores Amalgamated's repeated acknowledgment that Petra had no obligation to fund protective advances.

Here, by contrast, any inability by Petra to fund an additional draw request is speculative, inasmuch as Amalgamated never presented any such request to Petra. Amalgamated contends that the ICA requires Petra not only to fund advances, but also to "continue to be available for funding," and "'to ensure' that funds were advanced when required." Notably, however, the ICA does not require Petra to maintain a specified level of capital, or "to ensure" anything. The obligation that it imposes upon Petra is, once certain preconditions have been met, "to fund the Loan pursuant to the Loan documents and the terms thereof." By the testimony of Amalgamated's own witnesses, Petra fulfilled that obligation. In sum, Amalgamated has failed to show by probative evidence that Petra repudiated the ICA, either verbally, or by disabling itself from performing its obligations thereunder. Accordingly, no discovery showing that Petra might have been unable to fund an additional construction advance subsequent to the would have any relevance.

Amalgamated also moves to compel additional responses to its interrogatories, seeking "responses to interrogatories seeking factual detail underlying [Petra's] claims that the Loan's status required [Amalgamated] to take certain actions that it did not take or did not take in a timely manner." As noted above, Amalgamated fails to identify the specific interrogatories for which it seeks additional responses.

Amalgamated served its interrogatories in September 2011. Plaintiffs initially responded to the interrogatories on September 23, 2011, and after receiving a letter from Amalgamated on March 1, 2013, provided supplemental responses on April 29, 2013. Plaintiffs objected to certain interrogatories, and provided answers to other interrogatories over objection. For a number of interrogatories including numbers 5 through 19, plaintiffs objected on the ground that the answers called for legal conclusions and not evidentiary matter. Of most relevance to this motion, are interrogatory no. 10, which

states: "Describe in detail all the actions Plaintiffs contend Defendant should have taken under the Intercreditor Agreement, but allegedly did not take, and identify when you believe Defendants should have taken such action," and interrogatory no. 11, which states: "Describe in detail all the actions Plaintiffs contend Defendant should have taken under the Intercreditor Agreement but allegedly did not take in a sufficiently timely manner, and identify when you believe Defendant should have taken such actions." Plaintiffs' beliefs as to what Amalgamated should or should not have done, and plaintiffs' beliefs as to the appropriate timing of such actions, are not appropriate areas of inquiry for interrogatories. *See Pineda v. J. B. Roerig & Co.*, 43 A.D.2d 827 (1st Dep't 1974); *Mijatovic Noonan*, 172 A.D.2d 806, 806 (2d Dept 1991) ("Interrogatories which call for opinions or conclusions of law, rather than relevant facts, should be stricken"). To the extent Amalgamated moves to compel further responses to its interrogatories, it is denied.

As to the request for documents relating to standing, the documents submitted with Iacono's reply affidavit show that both plaintiffs have standing. Inasmuch as Iacono's affidavit is dated July 9, 2013, eleven days after the date of the notice of motion to compel, Amalgamated must not have had a copy of those documents at the time that it moved to compel. To the extent Amalgamated moves to compel additional documents regarding standing, the motion is denied. And to the extent that Amalgamated moves to compel additional discovery for the remaining categories stated in its motion, or additional deposition testimony, the motion is also denied.

In action no. 3, Amalgamated alleged affirmative defenses and counterclaims against All Rock, and brought cross claims against Marson, Fort Tryon and Thompson, which asserted its mortgage lien's priority over claims by Fort Tryon and all other defendants, declaring All Rock's lien null and void, restraining and enjoining Fort Tryon

and Thompson from making payments in satisfaction of the All Rock lien, and seeking damages incurred by reason of All Rock's lien against Marson jointly and severally with All Rock. Additionally, Fort Tryon and Thompson cross moved for summary judgment for dismissal of All Rock's action and termination of the mechanic's lien upon which the action is based, on the grounds that All Rock has willfully failed to appear for a deposition in the action that it commenced. Fort Tryon and Thompson also move to dismiss the cross claims asserted by Marson for foreclosure on a mechanics lien, dismissal of the cross claim and termination of the lien upon which it is based, on the grounds that Marson has failed to appear by counsel following this court's (J. Kapnick) November 30, 2011 order relieving Marson's prior counsel.

All Rock and Marson have failed to appear on these motions and have not put in any opposition. By virtue of their default, All Rock's and Marson's claims and cross claims asserted against Amalgamated, Fort Tryon and Thompson are dismissed, and the liens upon which they are based are terminated. As for Amalgamated's motion for summary judgment on its counterclaims and cross claims, it advances no argument in support of what is asserted in its verified answer. Its memoranda of law submitted in support contain no arguments as to why summary judgment should be granted, nor do its affidavits contain any supporting documents. As Amalgamated fails to make any showing in support of its motion for summary judgment on its cross claims against Fort Tryon and Thompson, the motion for summary judgment is denied, and Amalgamated's cross claims against Fort Tryon and Thompson are dismissed.

In accordance with the foregoing it is

ORDERED that, in *Petra Mortgage Capital Corp. LLC and Petra CRE CDO 2001-1, Ltd. v. Amalgamated Bank, as Trustee of Longview ULTRA I Construction Loan*

Investment Fund, Index No. 651861/2010, the portion of the motion by plaintiffs Petra Mortgage Capital Corp. LLC and Petra CRE CDO 2007-1, LTD. for a declaratory judgment (motion sequence no. 8), is denied as premature, without prejudice; and it is further

ORDERED that, in *Petra Mortgage Capital Corp. LLC and Petra CRE CDO 2001-1, Ltd. v. Amalgamated Bank, as Trustee of Longview ULTRA I Construction Loan Investment Fund*, Index No. 651861/2010, the portion of the motion by plaintiffs to dismiss defendant Amalgamated Bank's sixth, seventh, and ninth through twelfth affirmative defenses (motion sequence no. 8) is denied as to the sixth and tenth affirmative defenses, and is granted as to the seventh, ninth, eleventh and twelfth affirmative defenses of defendant Amalgamated Bank, as Trustee of Longview Ultra I Construction Loan Investment Fund, and the seventh, ninth, eleventh and twelfth affirmative defenses are dismissed; and it is further

ORDERED that, in *Petra Mortgage Capital Corp. LLC and Petra CRE CDO 2001-1, Ltd. v. Amalgamated Bank, as Trustee of Longview ULTRA I Construction Loan Investment Fund*, Index No. 651861/2010, the motion by defendant Amalgamated Bank to compel discovery (motion sequence no. 009) is denied; and it is further

ORDERED that, in *Amalgamated Bank, as Trustee of Longview Ultra I Construction Loan Investment Fund (now known as Longview Ultra Construction Loan Investment Fund), individually and as agent for itself and the other Lenders signatory thereto including Petra Mortgage Capital Corp. LLC as Co-Lender v. Fort Tryon Tower SPE LLC, et al.*, Index No. 101283/2010, as to the motion by defendants Fort Tryon and Rutherford H. Thompson, III to strike the note of issue and statement of readiness and to compel discovery (motion sequence no. 006) , the portion of the motion to strike the note

of issue and statement of readiness is denied for the reasons set forth on the record on October 7, 2013, and the portion of the motion to compel discovery is denied as moot; and it is further

ORDERED that, in *Amalgamated Bank, as Trustee of Longview Ultra I Construction Loan Investment Fund (now known as Longview Ultra Construction Loan Investment Fund), individually and as agent for itself and the other Lenders signatory thereto including Petra Mortgage Capital Corp. LLC as Co-Lender v. Fort Tryon Tower SPE LLC, et al.*, Index No. 101283/2010, the motion by plaintiff Amalgamated Bank for summary judgment against defendants Fort Tryon Tower SPE LLC and Rutherford Thompson, III (motion sequence no. 007) is denied; and it is further

ORDERED that in *Amalgamated Bank, as Trustee of Longview Ultra I Construction Loan Investment Fund (now known as Longview Ultra Construction Loan Investment Fund), individually and as agent for itself and the other Lenders signatory thereto including Petra Mortgage Capital Corp. LLC as Co-Lender v. Fort Tryon Tower SPE LLC, et al.*, Index No. 101283/2010, the cross motion (motions sequence no. 007) by defendants Fort Tryon Tower SPE LLC and Thompson for summary judgment on their first and second counterclaims plaintiff Amalgamated Bank is granted; and it is

ADJUDGED and DECLARED that: (a) the terms of the loans that are the subject of this action have not expired and the principal amounts of the loans are not now due and payable; (b) Fort Tryon is not in default of its obligations under the loans; and (c) Amalgamated is obligated to resume funding construction advances toward the completion of the construction project and Amalgamated, as administrative agent for itself and the other lenders, is obligated to resume disbursing advances toward the completion of the project; and it is further

ORDERED that Amalgamated, as agent, shall advance funds to pay for Fort Tryon's construction project, consistent with the requirements and procedures set forth in the Construction Loan Agreement and the Project Loan Agreement; and it is further

ORDERED that *Amalgamated Bank, as Trustee of Longview Ultra I Construction Loan Investment Fund (now known as Longview Ultra Construction Loan Investment Fund), individually and as agent for itself and the other Lenders signatory thereto including Petra Mortgage Capital Corp. LLC as Co-Lender v. Fort Tryon Tower SPE LLC, et al.*, Index No. 101283/2010 is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, in *All Rock Crushing, Inc. v. Fort Tryon Tower SPE, LLC, Marson Contracting Co., Amalgamated Bank, as Trustee of Longview Ultra I Construction Loan Investment Fund, as agent, Petra Mortgage Capital Corp. LLC, Rutherford H. Thompson III, et al.* Index No. 100618/2009, the motion by defendant Amalgamated Bank for summary judgment (deemed motion sequence no. 002) is granted only to the extent that it is brought against plaintiff All Rock and defendant Marson, and is in all other respects denied, and Amalgamated's cross claims against Fort Tryon and Thompson are dismissed; and it is further

ORDERED that in *All Rock Crushing, Inc. v. Fort Tryon Tower SPE, LLC, Marson Contracting Co., Amalgamated Bank, as Trustee of Longview Ultra I Construction Loan Investment Fund, as agent, Petra Mortgage Capital Corp. LLC, Rutherford H. Thompson III, et al.* Index No. 100618/2009, the cross motion brought by defendants Fort Tryon and Thompson (deemed motion sequence no. 002) to strike All Rock's complaint, dismiss the action and terminate the mechanic's lien, and to dismiss

Marson's cross claim and terminate the lien upon which it is based, is granted on default; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ADJUDGED and DECLARED that the lien recorded by defendant Marson on or about December 24, 2008 on the property located at 33-35 Overlook Terrace and 730-734 West 184th Street in Manhattan is null and void ab initio, and said lien is hereby discharged; and it is further

ADJUDGED and DECLARED that the lien recorded by plaintiff All Rock on or about July 31, 2008 on the property located at 33-35 Overlook Terrace and 730-734 West 184th Street in Manhattan is null and void ab initio, and said lien is hereby discharged; and it is further

ADJUDGED and DECLARED that any change order or agreement purporting to increase above the sum of $2,910,375.57 the amount to be paid to plaintiff for the provision of work, or materials to or for Fort Tryon's construction project was null and void ab initio; and it is further

ORDERED that the affirmative defenses and cross claims asserted against Amalgamated, Fort Tryon and Thompson by All Rock and Marson are dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: New York, New York
June 4, 2014

ENTER:

Saliann Scarpulla, J.S.C.