936 Coogans Bluff, Inc. v 936-938 Cliffcrest Hous. Dev. Fund Corp.

2017 NY Slip Op 31048(U)

May 12, 2017

Supreme Court, New York County

Docket Number: 850011/13

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

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

---X **Decision and Order**

936 COOGANS BLUFF, INC.

Plaintiff,

-against-

Index No. 850011/13

936-938 CLIFFCREST HOUSING DEVELOPMENT FUND CORPORATION, THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, AND JOHN AND JANE DOES\ 1-10, ABC LLC 1-10, XYZ CORP. 1-10,

Defendants.

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936-938 CLIFFCREST HOUSING DEVELOPMENT FUND CORPORATION,

Third-Party Plaintiff

-against-

THE WAVECREST MANAGEMENT TEAM LTD., COMMUNITY CAPITAL BANK n/k/a CARVER FEDERAL SAVINGS BANK, LEE WARSHAVSKY, SHUHAB HOUSING DEVELOPMENT FUND CORPORATION, JOHN AND JANE DOES 11-20, the identity of such persons being unknown to the Third-Party Plaintiff, but intended to describe those persons who corruptly influenced their employer, THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK to look away from their defalcations of the Third-Party Plaintiff's funds,

Third-Party Defendants.

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JOAN A. MADDEN, J.

In this foreclosure action, third-party defendants the Wavecrest Management Team, Ltd.

(Wavecrest) Shuhab Housing Development Fund Corp. (Shuhab), and Lee Warshavsky (Warshavsky) (together "the Shuhab defendants"), move for an order dismissing the Second Amended Third Party Complaint of defendant/third-party plaintiff 936-938 Cliffcrest Housing Development Fund Corp ("Cliffcrest") for failure to state a cause of action, and for including a claim for violation of 42 USC § 1983 after court denied Cliffcrest's motion for leave to add this claim (motion seq no. 015). Plaintiff separately moves to strike the affirmative defenses asserted against it in Cliffcrest's Second Amended Verified Answer (motion seq no. 017). Cliffcrest opposes both motions.

Cliffcrest separately moves to renew that portion of the court's decision and order dated March 30, 2016 in connection with motion sequence no. 010 ("March 30 amend order") that discontinued without prejudice the claims against then third-party defendant Carver Federal Savings Bank ("Carver")(motion seq no. 013).[1] Carver opposes the motion and cross moves for sanctions.

BACKGROUND

Cliffcrest is tenant owned development company and the owner of the property located at 938 St. Nicholas Avenue, New York, New York ("the Building"). Cliffcrest became the owner of the Building through third-party defendant Department of Housing Preservation and Development of the City of New York's (HPD's) Third-Party Transfer Program ("TPT"), established by Local Law 37 of 1996, which provides an alternative to in-rem foreclosure. The goal of the program is to transfer tax-delinquent buildings in poor condition to new owners capable of rehabilitating the buildings and managing them as low income housing.

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[1]Motion sequence nos. 013, 015 and 017 are consolidated for disposition.

Pursuant to the TPT, residential properties, on which the City holds tax liens, are transferred, first, to a private not-for-profit entity and, then, to a sponsor which agrees to provide construction or permanent financing, typically, in conjunction with partial funding by HPD, in accordance with HPD guidelines. In this case, the Building was originally taken by the City in rem and transferred to a not-for-profit Neighborhood Restore Housing Development Fund Corporation ("Neighborhood Restore") on May 17, 2001. On December 19, 2002, Neighborhood Restore transferred the Building to Shuhab, a sponsor selected by HPD through a Request for Proposal process. Shuhab appointed Wavecrest as the managing agent for the Building, and it is alleged that Wavecrest acted in that capacity from December 2002 until September 2010. Warshavsky is Shuhab's principal and acted as Secretary and Treasurer of Cliffcrest.

HPD holds two mortgages on the Building which were initially provided as part of a joint construction loan, originated in 2002, with Fleet National Bank ("Fleet"), to provide construction financing to rehabilitate the Building (hereinafter "the HPD mortgages").[2] In connection with this financing, on December 19, 2002, HPD and Fleet executed a Construction Loan Participation Agreement ("Participation Agreement") to fund HPD's share of the construction loan by providing funds to the lead lender, in this case Fleet.

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[2]According to HPD, on September 29, 2006, three mortgages originally made and dated December 19, 2002, in the principal amount of $2,512,103, were consolidated into one mortgage under which Cliffcrest was required to pay interest at a rate of .62% per annum starting on November 1, 2006, in monthly installments through November 1, 2036. Also, on September 29, 2006, two mortgages originally made and dated December 19, 2002 in the principal amount of $947,500, were consolidated into a second HPD mortgage, which is "a standing loan" with no interest or payments required with the debt to be forgiven barring a default. Cliffcrest paid the interest under the first HPD mortgage until April 2012 but has not made any payments since that time.

The rehabilitation of the Building was purportedly completed in September 2006; however, Cliffcrest alleges in its third-party action that substantial portions of the funds from the loan were not used to rehabilitate the Building. On or about January 27, 2007, title to the Building was transferred to Cliffcrest and the conversion closed. The individual units in the Building were sold to the current unit owners as low-income cooperative apartments at prices below market value. As part of the transfer, Cliffcrest assumed the obligations under all the mortgages on the Building, including the HPD and Fleet mortgages, and the construction loan was converted to a permanent loan.

On September 28, 2006, Cliffcrest executed and delivered to Community Capital Bank ("CCB"), which was the predecessor in interest to Carver, a Mortgage Note ("the Note") evidencing a separate commercial loan made to it in the principal amount of $1,650,000, plus interest as set forth in the Note. Simultaneously with the execution of the Note, Cliffcrest executed and delivered to CCB a Mortgage, Assignment of Leases and Rents and Security Agreement, which provided partial security for the money due and owing CCB under the Note. That same day, CCB assigned to Peny & Co. (Peny), the original plaintiff in this action, the Note and the Mortgage along with the Leases and Rents (together "the Loan Documents"). There is evidence in the record that Peny paid CCB $1,650,000 for the assignment of the Loan Documents. Pursuant to a subordination agreement HPD and CCB entered into on September 29, 2006, HPD agreed that the HPD mortgages, would be subject to and subordinate in time and payment to the liens, terms and covenants in the Loan Documents.

From 2006 until 2012, Cliffcrest made payments to Peny as agreed to under the Note and Mortgage without objection or reservation. However, it is alleged that beginning in March 2012,

Cliffcrest ceased making monthly payments of principal and interest due under the Loan Documents, and that Cliffcrest failed to make payments for real estate taxes assessed against the Building and failed to provide proof of insurance covering the Building. When Cliffcrest failed to cure its alleged defaults, Peny commenced this foreclosure action in 2013. Peny also filed an application for the appointment of a temporary receiver, which the court granted by order dated March 17, 2015.[3]

Cliffcrest moved for leave to serve an amended verified answer, counterclaims, and third-party complaint ("Proposed First Amended Pleading"), which motion was opposed by Peny and HPD. The Proposed First Amended Pleading asserted counterclaims, cross claims and third party claims for (1) rescission of the Note and Mortgage that are the basis of Peny's action on the ground that Cliffcrest was fraudulently induced into entering the Note and Mortgage; (2) fraud; (3) a permanent injunction barring Peny from proceeding to a judgment of foreclosure and sale and enjoining HPD, and the proposed third-party defendants to take all steps necessary to satisfy and discharge the note and mortgage and the notice of pendency filed in this action; (4) violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC § 1961 *et seq.;* and (5) violation of 42 USC § 1983 based on allegations that the RICO scheme specifically targeted African-Americans, Latino and immigrant citizens. Cliffcrest also sought to interpose the following four affirmative defenses: (1) failure to name a necessary party; (2) fraud; (3) failure to state a cause of action; and (4) unclean hands.

By decision and order dated June 20, 2014 (hereinafter "the June 20 order"), this court

[3]While the application was made *ex parte*, this court required that Peny give notice of the application.

denied Cliffcrest's motion to amend as to the proposed counterclaims and affirmative defenses asserted against Peny; denied the motion to amend as against HPD as premature without prejudice to renewal in accordance with the June 20 order; and granted the motion as to the proposed third-party defendants, which included the Shuhab defendants and Carver, which had not yet been served with the pleading, and directed that Cliffcrest serve an amended pleading in conformance with the court's decision within 45 days without prejudice to a further order as to the proposed cross claims against HPD.

On or about September 30, 2014, Shuhab and Warshavsky moved to dismiss the third party complaint (motion seq. no. 006), and Wavecrest and Carver separately sought the same relief (motion seq. nos. 005 and 007, respectively). On or about October 30, 2014, Peny moved for an order granting it, *inter alia*, summary judgment against Cliffcrest, a default judgment against certain defaulting defendants and referring the matter to a referee to compute (motion seq. 008). The motions were not opposed by Cliffcrest, whose attorney subsequently moved to withdraw as counsel. By order dated April 20, 2015, the court found that the motion to withdraw as counsel for Cliffcrest was moot in light of the filing of a notice of appearance by substitute counsel.

Cliffcrest then moved to amend its First Amended Pleading to assert claims, affirmative defenses, and allegations in a proposed Second Amended Verified Answer, Counterclaim, Cross Claim and Third-Party Complaint ("the Proposed Second Amended Pleading") and to address the prior motions seeking various relief against Cliffcrest (motion seq nos. 005, 006, 007, and 008), which were previously submitted without opposition. Cliffcrest also sought an order discontinue without prejudice the third-party claims against Carver.

The Proposed Second Amended Pleading asserted the following claims[4] against Peny, HPD and the Shuhab defendants: (1) fraud; (2) conspiracy to commit fraud, (3) violation of the Federal Fair Housing Act,42 U.S.C. 3604(b) et seq; (4) negligent misrepresentation; (5)&(6) violation of the New York City Human Rights Law (New York City Administrative Code ("Admin. Code"), pursuant to § 8-107(5)(a)(2) based respectively on the Building tenants' race and status as recipients of public benefits; (7) violation of the civil rights of the Building's residents, pursuant to 42 USC 1983;(8) breach of contract; (9) breach of warranty of habitability; and (10) conversion.

The Proposed Second Amended Pleading also asserted the following affirmative defenses as to Peny : (1) failure to state a cause of action, (2) unclean hands, (3) lack of standing, (4) failure to allege conduct which rises to the causes of action pleaded; (5) failure to mitigate damages; (6) failure to plead its claims with sufficient particularity; (7) failure to allege prerequisite conduct necessary to sustain Peny's claims; (8) fraud and fraud in inducement and conspiracy to commit fraud by Peny and its predecessors.

In the March 30 amend order the court, *inter alia*, denied Cliffcrest's motion for leave to amend in its entirety as to Peny (i.e. with respect to both its proposed counterclaims and affirmative defenses), and granted the motion as to HPD and the Shuhab defendants only to the extent of permitting the addition of the proposed causes of action for fraud and conspiracy to commit fraud, and directed that within 20 days Cliffcrest efile and serve a Second Amended Verified Answer, and Third-Party Complaint consistent with March 30 amend order. The court

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[4]While the Proposed Second Amended Pleading was labeled as Second Amendment Verified Complaint and Cross Claims, Counterclaims and Third Party Claims, the pleading itself referred only to third-party claims and improperly identified Peny as a third-party defendant.

also granted Cliffcrest's request to discontinue its third-party claims against Carver without prejudice.

By separate decisions and orders dated March 30, 2016, the court denied the motions to dismiss by Wavecrest and by Shuhab and Warshavsky (motion seq nos. 006 and 005 respectively) as moot in light of the partial grant of Cliffcrest's motion to amend.

As for Peny's motion for summary judgment on its foreclosure complaint (motion seq no. 008), the court granted the motion based, in part, on the court's finding in connection with the March 30 amend order (motion seq no 010) that Cliffcrest had failed to establish that the proposed amendment had prima facie merit as against Peny. Cliffcrest subsequently sought to vacate those parts of the decision and orders granting Peny summary judgment for foreclosure. The court granted Cliffcrest's vacatur request to the extent of vacating that part of its March 30 amend order which granted Peny summary judgment on its foreclosure cause of action and deleting its finding that Peny was a holder in due course of the Note and the Mortgage.[5] The court also vacated the decision and order filed under motion seq no. 008 granting Peny summary judgment, and provided a briefing schedule for Cliffcrest's opposition to the motion and Peny's reply.[6]

In the meantime, Peny assigned the Loan Documents and its rights in this action State of

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[5]Specifically, the court wrote that it was "deleting from page 15 of the 9March 30 amend order) the last sentence of the penultimate paragraph which reads 'Accordingly, Peny is a holder in due course of the Note and Mortgage, and thus takes them for value and free from claims asserted by Cliffcrest.'"

[6]Despite the court's order, Cliffcrest efiled a cross motion in response to the summary judgment motion. After a conference call with the parties, Cliffcrest withdrew the unauthorized cross motion and by order dated May 11, 2016, the court provided a new briefing schedule.

New York Mortgage Agency (SONYMA) and, by order dated March 30, 2016, this court substituted SONYMA as plaintiff.

On April 19, 2016, Cliffcrest efiled a Second Amended Verified Answer Counterclaim, Cross-Claim and Third-party complaint ("the Second Amended Pleading"). As permitted by the March 30 amend order, the Second Amended Pleading asserts fraud and conspiracy to commit fraud claims against third-party defendants HPD and the Shuhab defendants. However, the Second Amended Pleading also contains eight affirmative defenses against Peny and includes a third-party claim against the Shuhab defendants for violation of 42 U.S.C. § 1983, which were not allowed by the March 30 amend order.

On April 26, 2016, plaintiff filed a Notice of Rejection of Second Amended Pleading on the grounds that it included eight affirmative defenses expressly rejected by the June 20 order and the March 30 amend order, and was directed with respect to Peny prior to the substitution of SONMYA as plaintiff.

Subsequently, SONYMA assigned the Loan Documents and its rights in this action to 936 Coogans Bluff, LLC ("Coogans Bluff"). While the other parties to the action agreed to stipulate to substitute Coogans Bluff as plaintiff, Cliffcrest opposed the substitution. Coogans Bluff moved to be substitute as plaintiff, and Cliffcrest opposed the motion. By decision and order dated September 21, 2016, the court granted the motion, and directed that Coogans Bluff be substituted as plaintiff.

The Shuhab Defendants' Motion To Dismiss

The Shuhab Defendants move to dismiss the third party claims in the Second Amended Pleading, asserting the § 1983 claim was not permitted by the March 30 amend order and that

fraud and conspiracy to commit fraud claims are not pleaded with sufficient particularity.

Cliffcrest opposes the motion, arguing that although the March 30 amend order did not permit the addition of the § 1983 claim, the law of the case doctrine permits its addition since the June 20 order permitted the claim to be added against the third-party defendants. As for the fraud claims, Cliffcrest argues that the Shuhab defendants have not shown that the fraud claims fail to state a cause of action and point to the March 30 amend order which found that the claims had prima facie merit and granted leave to add them.

In reply, the Shuhab defendants assert that the law of the case doctrine does not apply to a motion to amend and points out that the June 20 order granting Cliffcrest leave to file an amended pleading did not address the merits of the proposed third-party claims against the unjoined Shuhab defendants and other proposed third-party defendants.

Several of the issues raised in connection with the motion and opposition concern the proper application of the law of the case doctrine. The courts have held that "[t]he doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned .... The doctrine 'applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision..and to the same questions presented in the same case" Ramanathan v. Aharon, 109 AD3d 529, 530 (2d Dept 2013)(internal citations omitted). "[I]n determining whether law of the case applies, the procedural posture and evidentiary burdens of the litigants must be considered." Feinberg v. Boros, 99 AD3d 219, 224 (1st Dept 2012), lv denied 21 NY3d 851 (2013).

Here, contrary to Cliffcrest's position, the law of the case doctrine does not bar

consideration of the Shuhab defendants' motion to dismiss with respect to the section 1983 claim against those third-party defendants. While the June 20 order permitted Cliffcrest to serve the third-party complaint containing this claim, such order did not consider the merits of the third-party claims and was issued before the Shuhab defendants had been joined as parties to the action and had an opportunity to oppose the claim. See Chanice v. Federal Ex. Corp, 118 AD3d 634 (1st Dept 2014)(law of the case doctrine does not apply where defendant was not a party to the case at time of motion to amend and therefore "did not have a full and fair opportunity to litigate when the initial determination was made").

As the law of the case doctrine does not apply, the court will now address the Shuhab defendants' motion to dismiss the section 1983 claim. At the outset, it must be emphasized that the court addressed this issue as to the Shuhab defendants in the March 30 amend order and found the claim to be unavailing. Specifically, the court wrote:

> The proposed seventh cause of action, for relief under 42 USC § 1983, alleges that the third-party defendants, under the color of state law in connection with the administration of the TPT program "deprived its residents of their constitutionally protected property interest in the Building without due process of law, at least in part due to racial, ethnic, and immigration animus and stereotyping" (Proposed Pleading, ¶ 16). "Causes of action asserted pursuant to section 1983 have a three-year statute of limitations in New York ... and accrue when the plaintiff knows or has reason to know of the injury which is the basis of [the] action." Way v. City of Beacon, 96 AD3d 829 (2d Dept 2012). Here, even assuming there are factual issues as to whether the action was timely commenced, the motion to amend to add this claim must be denied. To succeed on its claim for damages pursuant to 42 U.S.C. § 1983, Cliffcrest must establish (1) the deprivation of a protectable property interest, (2) by one acting under the authority of law. Town of Orangetown v. Magee, 88 NY2d 41, 52 (1996)(citation omitted). The hallmark of property "is an individual entitlement grounded in state law, which cannot be removed except for cause. " Id.

> (internal citations omitted). Here, assuming the Building residents had protectable property interest in the Building, the Proposed Second Amended Pleading does not allege that Cliffcrest was deprived of a right to that property, but, instead that the Building in which they have a property interest was not renovated and rehabilitated as promised. Accordingly, the proposed claim under this section is without merit and cannot be added.

Notwithstanding the court's determination in the March 30 amend order that the section 1983 claim was without merit as against the Shuhab defendants, Cliffcrest has included this claim against these defendants in its Second Amended Pleading. For the same reasons stated in the above quote from the March 30 amend order, the claim is without merit. Accordingly, the Shuhab defendants' motion to dismiss the section 1983 claim is granted.

As for the fraud claims, the March 30 amend order granted Cliffcrest leave to amend to add these claims, and the Shuhab defendants opposed the motion, asserting that the fraud claims were untimely. While the Shuhab defendants opposed the motion to amend to add the fraud claims on statute of limitations grounds, and not for failure to state a cause of action, the law of the case doctrine precludes these defendants from challenging the sufficiency of the same pleadings which the March 30 amend order found sufficient to state a claim for fraud and conspiracy to commit fraud See Troy Pub Co., Inc. v. Dryer, 110 AD2d 327 (3d Dept 1985); 28 NYJur2d Courts and Judges, §266 [Nov 2016]).[7]

Moreover, even if the court were to consider the merits of the Shuhab defendants' motion to dismiss the fraud claim, the motion would be denied. To plead a cause of action for fraud, it

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[7]However, law of the case doctrine would not preclude the Shuhab defendants from moving for summary judgment dismissing these claims upon completion of discovery. Baskin and Sears, P.C. v. Lyons, 188 AD2d 307 (1st Dept 1992),

must be alleged that party charged with fraud made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendants when made, for the purpose of inducing plaintiff's reliance, justifiable reliance on the alleged misrepresentation or omission by the plaintiff, and injury. Lama Holding Company v Smith Barney Inc., 88 NY2d 413, 421 (1996). Additionally, "[while] CPLR 3016 (b) requires factual allegations in support of each element of fraud... to meet such requirement a plaintiff need only provide sufficient detail to inform defendants of the substance of the claims" See Kaufman v. Cohen, 307 AD2d 113, 120 (1st Dept 2003)(internal citation and quotation omitted). In this connection, it has been held that the pleading requirements for fraud should "not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud." Bernstein v. Kelo & Co., 231 AD2d 314, 320 (1st Dept 1997)(internal citation and quotation omitted). Next, to state a claim for conspiracy to commit fraud there must be allegations of fact from which it can be inferred that the party at issue entered into an agreement or understanding with the other defendants (against which particular acts of fraud were alleged) to cooperate in any fraudulent scheme. Abrahami v UPC Construction Co., Inc., 176 AD2d 180 (1st Dept 1991).

Here, the allegations in the Second Amended Pleading are sufficient to state a claim for fraud and conspiracy to commit fraud. In particular, it is alleged, *inter alia*, that the Shuhab defendants, along with HPD, induced the Building residents to participate in HPD's TPT Program with promises of ownership and improving the quality of the Building, and that these third-party defendants would take all steps necessary to perform the rehabilitation and renovation process; that despite agreements outlining a scope of work and securing financing to pay for the

work, at the completion of the process, the Buildings were in shoddy condition, uninhabitable and dangerous; that the residents relied on the third-party defendants' representations that the work would be completed in accordance with the scope of work and that the third-party defendants took loan proceeds which left the residents with an excess of $6,000,000 in debt, that the Building is in worse condition than before and requires $11,889,405.31 in repairs; that the representations were knowingly false and intended to induce reliance and defraud Cliffcrest of the benefits the residents believed they were receiving (Second Amended Pleading ¶'s 292-301). It is further alleged that the Building residents "justifiably relied on the third-party defendants' representations that they would not be saddled with a Building in which repairs were not made and be forced to repay loans that were stolen by ...Shuhab's contractor" (Id, ¶ 298), and that "the full extent of the debts and balances was not revealed until Wavecrest was removed as the management company [and that Wavecrest] continually made misrepresentations regarding the balance that was in the Building's accounts" (Id, ¶ 299).

The proposed claim for conspiracy to commit fraud is also sufficient as it alleges "a conspiracy to commit fraud against Cliffcrest by the third-party defendants which worked together with Shuhab's contractor, a defunct entity, to form a scheme or plan of misrepresenting and omitting material facts about the Building so as to induce them to purchase the units in the Building [and that] [t]his scheme or plan was furthered each time the third-party defendants evaded requests for information sufficient for the residents to understand the nature of the arrangement that they were entering into with third-party defendants" (Id, ¶ 303, 304). It is further alleged that "rather than make the desperately needed renovations and rehabilitation of the Building the third-party defendants continually and perpetually hid the truth from Cliffcrest and

its residents" (Id, ¶ 308).

Accordingly, the Shuhab defendants' motion to dismiss the fraud claims is denied.

Plaintiff's Motion to Strike

Plaintiff moves to strike the Second Amended Pleading as defective as it asserts eight affirmative defenses which the court found were without merit in the June 20 order and March 30 amend order. Plaintiff also moves on the ground that the pleading is directed at Peny which is no longer the proper plaintiff since SONYMA was substituted as the plaintiff, and SONMYA has since assigned its interests to the current plaintiff, Coogans Bluff.

Cliffcrest opposes the motion, arguing that a motion to strike is not the proper procedural device and that the Second Amended Pleading was submitted in accordance with the court's vacatur of that part of the March amend order which vacated the grant of summary judgment in favor of plaintiff. Cliffcrest also points to additional evidence as grounds for denying the motion, and, in particular, points to the Loan Commitment Letter dated August 18, 2006 detailing the requirements for the loan. Cliffcrest claims the letter was produced only after service of a subpoena, and links plaintiff to affirmative wrongful actions, including the improper closing of the loan.

In reply, plaintiff argues that the merits of the summary judgment motion are not at issue but, rather, whether Cliffcrest improperly filed the Second Amended Pleading in violation of the court's previous decisions. Moreover, plaintiff asserts that the April 8, 2016 order, permitting Cliffcrest to submit further opposition to the summary judgment motion did not allow Cliffcrest to reassert defenses against plaintiff that had been rejected twice by the court.

Plaintiff's motion has merit. First, a motion to strike is the proper remedy when an

amended pleading pursuant to leave of the court does not conform to the order granting leave to amend. See Ias Bicor Corp v. Mezrahi, 22 AD2d 898, 898 (2d Dept 1964); CPLR 3025(b), McKinney's Cons. Laws of NY; C30125:21. As for Cliffcrest's argument that the Loan Commitment Letter on which it relies justifies its unilaterally decision to include defenses against plaintiff that have been rejected by the court, such argument is contrary to the procedural requirements of the CPLR.[8] See Krsheedt Mfg Co. V. Rosenzweig, 189 AD 217 (1st Dept 1919); 6 Carmody-Wait 2d § 34:84 (December 2016)(noting that "an amended pleading, if amended by leave of court, should conform to the order granting leave to amend, and subsequent service of a pleading differing from the proposed pleading is regarded as evidence of bad faith").

Procedurally, it is noted the court vacated that part of the March 30 amend order granting plaintiff summary judgment in the foreclosure action (in motion seq. no. 010) and permitted Cliffcrest to submit opposition to plaintiff's separate summary judgment motion (motion seq. no. 008). With respect to Cliffcrest's argument that the court, in vacating the summary judgment determination, the court also vacated that part of the decision denying Cliffcrest leave to assert affirmative defenses, this argument is without legal or factual basis. Specifically, while the court found that whether plaintiff was a holder in due course remained at issue, this finding does not alter the court's determination rejecting Cliffcrest's proposed affirmative defenses.[9]

Accordingly, plaintiff's motion to strike the Second Amended Pleading is granted to the extent of striking the eight affirmative defenses which were not allowed by the March 30 amend

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[8]In addition, as noted below, Cliffcrest was provided with the Loan Commitment letter during discovery before Cliffcrest made the motion to amend.

[9]However, the issue as to whether plaintiff is a holder in due course will be considered by the court in connection with the submitted summary judgment motion on the foreclosure action.

order, and the court need not reach whether asserting the claims against Peny, which is no longer the named plaintiff, provides a basis for striking the pleading.

Cliffcrest's Motion to Renew

Cliffcrest separately moves to renew that portion of the March 30 amend order that discontinued the claims against Carver without prejudice. Carver opposes the motion and cross moves for sanctions. The motion and cross motion are denied.

As noted above, in connection with its most recent motion to amend, Cliffcrest requested that an order be issued discontinuing the third-party claims against Carver without prejudice. The motion was granted without opposition.

Cliffcrest now seek renewal with respect to such discontinuance, arguing that the Loan Commitment Letter provides evidence that Carver was not "innocent" but was involved in the misconduct leading to Cliffcrest being defrauded. Specifically, Cliffcrest argues that it "only came to know of the Loan Commitment Letter" after the motion in which it sought to discontinue the claims against Carver was fully submitted, and that Carver "refused to turn over [the Loan Commitment Letter]."

The Loan Commitment Letter provides for the "conditional approval" of the loan, and states that it "does not and is not intended to set forth all of the terms and conditions of the credit facilities herein." The letter also states under the heading "Loan Conditions Precedent" that "[t]he Lender's obligation (i.e. Carver's obligation[10]) to make the loan shall be subject to, and conditioned upon, receipt of the following, which must be satisfactory in form and substance and acceptable to the Lender...in their sole discretion, all of which are conditions precedent to the

[10]The Loan Commitment Letter was issued by Carver's predecessor in interest, CCB.

Loan." It then lists various conditions, to the loan, including, *inter alia*, Authorization, Collateral, Appraisal, No Liens, Insurance, Due Diligence, Certified Rent Roll, and Certificate of Occupancy. Notably, the letter does not impose any obligations or conditions on the Lender prior to its providing the loan moneys.

Nonetheless, according to Cliffcrest, the Loan Commitment Letter shows that Carver improperly closed the loan, which was conditioned on Carver receiving proof that the work was completed, that all permits and approvals were obtained, and a permanent certificate of occupancy was issued. In particular, Cliffcrest argues that as the certificate of occupancy was never issued, Carver acted improperly in closing the loan.

Carver opposes the motion and cross moves for sanctions, asserting that it did not withhold the Loan Commitment Letter and that it was available to Cliffcrest for over eight months before the court granted Carver's motion to discontinue the claim against Carver in March 2016. In particular, Carver points to evidence that it provided Cliffcrest with the Loan Commitment Letter in July 2015,[11] and therefore it argues that there are no "new facts" warranting a grant of renewal. Significantly, as to the merits, Carver argues that the Loan Commitment Letter imposed obligations on Cliffcrest and not it. Specifically, Carver argues that the letter conditioned the closing of the loan on Cliffcrest completing the construction and Cliffcrest obtaining a certificate of occupancy. Carver also notes that Cliffcrest fails to provide a proposed pleading and does not identify with specificity the facts which it claims to pursue against it.

Carver further asserts that, under these circumstances, it is entitled to sanctions based on

[11]It appears from the record that Cliffcrest moved to amend and to discontinue its claims against Cliffcrest in May 2015, and Cliffcrest's reply was submitted in October 2016.

Cliffcrest's misrepresentations and procedurally improper attempt to reassert its claims against Carver.

In reply, Cliffcrest submits an April 28, 2015 letter from Carver's counsel to Cliffcrest's counsel which Cliffcrest argues "evidences Cliffcrest's reliance on Carver's misrepresentations regarding its involvement in the wrongdoing surrounding Cliffcrest's conversion into a housing development fund corporation." Notably, however, Cliffcrest does not deny that Cliffcrest had the Loan Commitment Letter before its motion to discontinue the claims against Carver was fully submitted and well before the issuance of the March 30 amend order granted this relief.

"Pursuant to CPLR 2221(e)(2) and (3), a motion to renew shall be based upon new facts not offered on the prior motion that would change the prior determination ... and ... shall contain reasonable justification for the failure to present such facts on the prior motion." Nassau County v. Metropolitan Transp. Authority, 99 AD3d 617, 619 (1st Dept 2012) lv dismissed, 21 NY3d 921 (2013). At the same time, "the court, in its discretion, may ... grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made" Id., quoting Tishman Constr. Corp. of NY v. City of New York, 280 AD2d 374, 376 (1st Dept 2001).

Under this standard, Cliffcrest's motion to renew must be denied. First, the motion is not based on new facts since it is undisputed that Cliffcrest had the Loan Commitment Letter on which Cliffcrest basis its renewal motion prior to the time that the motion to discontinue was fully submitted. Moreover, Cliffcrest's reliance on the letter from Carver's counsel to argue that it was misled as to Carver's involvement in the alleged wrongdoing is unsupportable and, in any event, ignores that after the letter was sent, Carver provided Cliffcrest with the Loan

Commitment Letter.

Next, there is no basis for granting renewal in the interest of justice, particularly as the record is devoid of evidence that Carver engaged in any wrongdoing in providing loan money to Cliffcrest. In this connection, contrary to Cliffcrest's argument, the Loan Commitment Letter does not impose any obligation on Carver before loaning the money to Cliffcrest. To the contrary, as pointed out by Carver, the Loan Commitment Letter imposed obligations on Cliffcrest to obtain the necessary approvals and to complete construction before the loan closed (See Loan Commitment Letter, at 3 (stating that "[t]he Lender's obligation to make the loan shall be subject to, and conditioned upon, receipt of the following, which must be satisfactory in form and substance and acceptable to the Lender...in their sole discretion, all of which are conditions precedent to the Loan").

Finally, while the motion to renew is denied, it cannot be said that Cliffcrest's conduct in seeking renewal was frivolous so as to warrant the issuance of sanctions pursuant to 22 NYCRR § 130-1.1.

CONCLUSION

In view of the above, it is

ORDERED that Cliffcrest's motion to renew that portion of the March 30 amend order that discontinued the action against Carver Federal Savings Bank ("Carver")(motion seq no. 013) is denied; and it is further

ORDERED that Carver's cross motion for sanctions is denied; and it is further

ORDERED the motion by third-party defendants the Wavecrest Management Team, Ltd. Shuhab Housing Development Fund Corp., and Lee Warshavsky to dismiss the claims Second

Amended Third Party Complaint (motion seq no. 015) is granted to the extent of dismissing the claim against them alleging a violation of 42 USC § 1983, and denying the motion with respect to the fraud claims; and it is further

ORDERED that plaintiff's motion to strike Cliffcrest's affirmative defenses asserted against it in Second Amended Pleading (motion seq no. 017) is granted and the defenses are stricken without prejudice to Cliffcrest's arguments in opposition to the summary judgment with regard to plaintiff's status as a holder in due course; and it is further

ORDERED that Cliffcrest shall serve and file an amended pleading consistent with the foregoing within 30 days of efiling this decision and order.

DATED: May 2, 2017