SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** IAS MOTION 5

Justice

----------X

J COFFEY CONTRACTING INC.,
Plaintiff,

- v -

THE BLUESTONE ORGANIZATION, INC.,BANTA HOMES CORP., 11 WEST 126TH HOLDINGS LLC,11 WEST 126TH STREET LENDER 1 LLC,11 WEST 126TH STREET LENDER 2 LLC,NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY ENERGY EFFICIENCY CORPORATION, M&D FIRE DOOR, OROS CORPORATION, PLATT BYARD DOVELL WHITE ARCHITECTS L.L.P., JOHN DOE NO. 1 THROUGH JOHN DOE NO. 100,
Defendants.

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INDEX NO. 152952/2019

MOTION DATE 12/8/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number, were considered on this motion to dismiss (sequence 002): 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 74, 75, 77, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

Plaintiff J Coffey Contracting Inc. commenced this action to foreclose on a mechanic's lien, alleging that it subcontracted with Defendant Banta Homes Corp. ("Banta"), a general contractor, in connection with construction at 11 West 126th Street, New York, New York, owned by Defendant 11 West 126th Holdings LLC (the "Project," "Property" and "Owner," respectively), and that Banta failed to pay Plaintiff for work performed under the subcontract. Banta and Co-Defendant Bluestone Organization, Inc. ("Bluestone"), represented jointly by the same counsel, answered, and Banta asserted cross-claims asserting its own mechanic's liens. Defendant 11 West 126th Street Lender 2 LLC ("Lender 2") now moves, pre-answer and pursuant to CPLR 3211(a)(1), to dismiss the Complaint's first and sixth claims and Banta's first, second, third, and eighth cross-claims, arguing that documentary evidence establishes Lender 2's priority over Plaintiff and Banta's mechanic's liens. Plaintiff and Banta oppose. For the reasons below, the Court denies the motion.

BACKGROUND AND PROCEDURAL HISTORY

Non-party FYM Millbrook LLC ("FYM"), which provides private loans, created Lender 2 to provide a loan of $339,111.20 to the Owner (the "Lender 2 Loan"). According to Lender 2, the Lender 2 Loan had the "the sole purpose of covering various soft costs, such as costs relating to the sale of units of a 'passive house' condominium that the Owner was building at the Property, legal and accounting fees, lender costs, and consultant fees" (*NYSCEF 57* [Yassky Aff]

¶ 2).[1] The Owner also obtained financing from Defendant 11 West 126th Street Lender 1 LLC ("Lender 1"); according to Lender 2, "to satisfy a prior loan and to cover costs relating to the actual construction of the condominium, including costs of building professionals' services, building materials, and labor ("Lender 1 Loan"; *Yassky Aff* ¶ 3).[2] Though, as discussed below, the parties disagree on Lender 2's characterization of the loans, the parties substantively agree on the other relevant facts, including the subsequent timeline.

In or about January 2016, Banta entered into a contract with the Owner for Banta to serve as a general contractor on the Project, to provide "material, equipment, supplies and labor to construct and erect the building and appurtenances thereon ..." (*NYSCEF 69/Banta First Amended Answer* ["*Banta Answer*"] ¶ 12).[3] According to Banta, it fully performed (*Banta Answer* ¶ 13). On or about August 5, 2016, Plaintiff entered into a subcontract with general contractor Banta to provide, furnish, and supply certain construction services and materials for the Project or the renovation, construction and alteration of the Premises (*NYSCEF 1* [*Complaint*] ¶ 17). From August 2016 to August 31, 2017, Plaintiff furnished labor and materials pursuant to the subcontract, including general contracting, excavation, supplying and installing concrete, and foundation work (*Complaint* ¶¶ 18-21). Plaintiff received no payment (*Complaint* ¶ 21), and Banta received only partial payment (*Banta Answer* ¶¶ 16-32).

On or about June 23, 2017, the Owner and Lender 2 entered into a project loan agreement (*NYSCEF 59* [the "Lender 2 Agreement"]). The Lender 2 Agreement contains various provisions limiting the advances under the agreement to "Soft Costs," defined by the Agreement as "[t]he costs relating to the Project or the Project Loan, including but not limited to, Borrower's legal fees and costs, marketing expenses, and leasing and brokerage commissions, which are not 'costs of an improvement' (as such term is defined in Section 2(5) of the New York Lien Law)" (¶ 1.26; *see also* ¶ 1.12 ["NO HARD COSTS WILL BE ADVANCED UNDER THIS PROJECT LOAN."] [emphasis in original]; *Lender 2 Agreement, Exh 1, Sched B* ["All disbursements under the Line Item Budget are solely for Soft Costs"]).

On or about June 23, 2017, the Owner granted Lender 2 a mortgage, assignment of leases and rents, and security agreement against the Property (*Yassky Aff* ¶ 10, citing *NYSCEF 60* [the "Lender 2 Mortgage"]). Also on June 23, 2017, the Owner executed and delivered a project loan promissory note (the "Lender 2 Note") in favor of Lender 2, as well as various other personal guaranties and agreements (*Yassky Aff* ¶¶ 11-13, citing *NYSCEF 64-67*). Lender 2 recorded the mortgage with the New York City Department of Finance Office of the City Registrar on July 13, 2017, behind the consolidated, amended, and restated mortgage, assignment of leases and rents and security agreement that the Owner granted Lender 1 against the property in the principal amount of $2,000,000 (the "Land Mortgage"), and the building loan mortgage, assignment of leases and rents and security agreement that the Owner granted Lender 1 against the Property in the principal amount of up to $3,660,888.80 (the "Building Mortgage"; *Yassky*

[1] Affiant Marc Yassky, a manager at FYM Millbrook LLC ("FYM"), is also Lender 2's manager (*Yassky Aff* ¶¶ 1-2).
[2] The Lender 1 Loan and related mortgage is the subject of another action before Justice Goetz, consolidated with this action solely for joint trial (*NYSCEF 84*, NY County Index No. 850027/2018). Banta raises similar arguments in that action related to its mechanic's lien.
[3] Unless otherwise noted, all citations to the Banta Answer reference the Counterclaim section.

Aff ¶ 10, p 5 fn 2, *NYSCEF 60, 62-64*). Lender 2 filed the Lender 2 Agreement with the New York County Clerk's office on July 18, 2017 (*Banta Answer, Counterclaim* ¶ 5).

As of the filing of this motion, Lender 2 has advanced, without repayment, a total of $168,529.14 under the Lender 2 Agreement; according to Lender 2, "Lender 2 has never authorized the Owner to apply the Lender 2 Advances to pay for actual construction costs or for any purpose other than those set forth in the Lender 2 Agreement" (*Yassky Aff* ¶¶ 17-18). The payments were all made on June 23 or 26, 2017, months before Plaintiff or Banta filed their notices of mechanic's lien (*Yassky Aff* ¶ 17).

On March 23, 2018, Plaintiff timely filed a notice of mechanic's lien, extended on March 7, 2019, alleging work commenced on August 8, 2016 (*Complaint* ¶¶ 23, 28-29, *Complaint Exh A*). Plaintiff's Complaint seeks to foreclose its mechanic's lien and cut off the Lender 2 Mortgage, and seeks a determination that the Lender 2 Mortgage is subordinate to Plaintiff's right under its notice of mechanic's lien (*Complaint* ¶¶ 8[c], 33, 60). Specifically, Plaintiff alleges that the Lender 2 Agreement is a building loan contract under the New York Lien Law, and therefore subject to additional filing requirements with which Lender 2 failed to comply.

Similarly, Banta alleges that it timely filed its own mechanic's liens on March 16 and April 9, 2018, followed by an extension on March 12, 2019, a third lien on July 26, 2018, and an extension of the third lien on July 19, 2019 (*Banta Answer* ¶¶ 32, 37-38, 49-50, 61-62). The liens claim that Banta began work on March 29, 2016. All three liens were filed after the Lender 2 Mortgage was recorded, and after Lender 2 made its advances (*Yassky Aff* ¶¶ 16-17). Banta's first, second, third, and eighth cross-claims seek a determination that the Lender 2 Mortgage is subordinate to Banta's lien notices, making essentially the same arguments as Plaintiff.

In support of its argument, Lender 2 argues that the documentary evidence establishes that the Lender 2 Mortgage has priority over the notices of mechanic's lien because: (1) the Lender 2 Mortgage is not a building loan contract under the New York Lien Law, and is therefore not subject to the specific recording requirements of New York Lien Law § 22; and (2) Lender 2's advances under the Lender 2 Loan occurred before the notices of mechanic's lien were filed.

In opposition, Banta argues: (1) that Lender 2's documentary evidence shows that the Lender 2 Agreement and Mortgage are actually a building loan agreement, and are therefore, based on Lender 2's failure to strictly comply with the Lien Law's recording requirements, subordinate to Banta's mechanic's liens, or at best the Lender 2 Agreement is ambiguous; and (2) that because Banta will ultimately demonstrate that its liens have priority over Lender 1's mortgage, Banta's liens must also have priority over the Lender 2 Mortgage.[4]

Similarly, also in opposition, Plaintiff argues that: (1) the Lender 2 Agreement is a "building loan contract" which Lender 2 failed to file on or before the date that the Lender 2 Mortgage was recorded; and (2) that because Plaintiff's mechanic's lien has priority over Lender 1's mortgage, Plaintiff's lien has priority over the Lender 2 Mortgage.

[4] Banta has not affirmatively cross-moved for this, or any other, relief.

DISCUSSION

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence must "utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*1424-1428 Realty LLC v Liu*, 169 AD3d 586, 587 [1st Dept 2019]).

II. Lien Law § 22

Lien Law § 22 provides, as relevant here, that

> A building loan contract either with or without the sale of land, and any modification thereof, must be in writing and duly acknowledged, and must contain a true statement under oath, verified by the borrower, showing the consideration paid, or to be paid, for the loan described therein, and showing all other expenses, if any, incurred, or to be incurred in connection therewith, and the net sum available to the borrower for the improvement, and, *on or before the date of recording the building loan mortgage made pursuant thereto, to be filed in the office of the clerk of the county in which any part of the land is situated* ...
>
> *If not so filed the interest of each party to such contract in the real property affected thereby, is subject to the lien and claim of a person who shall thereafter file a notice of lien under this chapter* (emphasis added).

Lien Law § 22 contains two requirements to ensure a mortgage's priority: "a building loan contract must be in writing and include, among other things, the net sum available to the borrower for the intended improvement," and, as relevant here, "the building loan contract must be filed in the County Clerk's Office *before* the related mortgage is recorded" (*Intl. Exterior Fabricators, LLC v J. Petrocelli Contr., Inc.*, 2011 NY Slip Op 31545[U], *6 [Sup Ct, NY County 2011, Hunter, J.] [emphasis added]). "This provision ensures that the terms of a construction loan are filed publicly (before the recording of the related mortgage) to give contractors full notice of the funds available to pay them, and that any subsequent amendments to those terms are made public in a timely manner. If these requirements are not met, a mechanic's lien is given priority over the mortgage securing the construction loan" (*id.* at *7; *Howard Sav. Bank v Lefcon Partnerhip*, 209 AD2d 473, 475-76 [2d Dept 1994], *lv dismissed*, 86 NY2d 837 [1995]). Here, there is no dispute that the Lender 2 Agreement was not filed before Building 2 Mortgage. Rather, the parties dispute whether the Lender 2 Agreement is a "building loan contract" at all. If so, it would be subject to the strict filing requirements of Lien Law § 22.

Lender 2 argues that the Lender 2 Mortgage is not a "building loan mortgage" under the Lien Law because the Lender 2 Agreement is not a "building loan contract" under the Lien Law, and therefore not subject to Lien Law § 22. Lien Law § 2(13), as relevant here, defines a "building loan contract" as

> a contract whereby a party thereto, in this chapter termed "lender," in consideration of the express promise of an owner to make an improvement upon real property, agrees to make advances to or for the account of such owner to be secured by a mortgage on such real property, whether such advances represent moneys to be loaned or represent moneys to be paid in purchasing from or in selling for such owner bonds or certificates secured by such mortgage upon such real property, providing, however, nothing herein contained shall be deemed to construe as a building loan contract a preliminary application for a building loan made by such owner and accepted by such lender if, pursuant to such application and acceptance, a building loan contract is thereafter entered into between the owner and the lender and filed...

A "building loan mortgage" is "a mortgage made pursuant to a building loan contract and includes an agreement wherein and whereby a building loan mortgage is consolidated with existing mortgages so as to constitute one lien upon the mortgaged property" (Lien Law § 2[14]). "A classic building loan mortgage is characterized, *inter alia,* by (1) a requirement in the loan agreement that the mortgagor construct a building or improvement with the loan and (2) a disbursement of the loan in installments—as the construction progresses—rather than in one lump sum" (*Juszak v Lily & Don Holding Corp.*, 224 AD2d 588, 588-589 [2d Dept 1996] [holding that the mortgage was not a "bona fide construction mortgage" because it did not contain a requirement that anything be built on the subject parcel, its proceeds were advanced in a single lump sum, and the amount actually received was just over half of the projected construction costs], citing Lien Law § 2 [13], [14]).

"Indeed, a construction mortgage is defined as 'one obtained for the purpose of financing construction, under which the mortgagee is empowered and *obligated* to disburse the funds to the builder or contractor as the construction progresses'" (*Juszak*, 224 AD2d at 589, citing 55 Am Jur 2d, Mortgages, § 14 at 203 [emphasis in original]). Importantly, "[e]ven if not labeled a building loan contract," an agreement "can still be denominated as a building loan contract if it meets the Lien Law's requirements of a building loan" (*Lehman Bros. Holdings, Inc. v 25 Broad, LLC*, 2011 NY Slip Op 31931[U], *23-24 [Sup Ct, NY County 2011, Goodman, J.], citing *Lincoln First Bank, N.A. v Spaulding Bakeries, Inc.*, 117 Misc 2d 892 [Sup Ct, Broome County 1983]).

Lender 2 highlights several provisions in the Lender 2 Agreement purporting to support its argument that the Lender 2 Mortgage is not a "building loan mortgage" and the Lender 2 Agreement is not a "building loan contract" under the Lien Law, and therefore not subject to the additional recording requirements of Lien Law § 22. For example, Lender 2 highlights the absence of any construction requirement, and conversely the presence of several provisions prohibiting Owner from applying loan proceeds to pay for "improvement" to the Property:

> 1.12 Hard Costs: The costs of labor, materials and equipment necessary for the completion of the Construction Work in accordance with the Budget, as set forth and itemized in the

> Budget. NO HARD COSTS WILL BE ADVANCED UNDER THIS PROJECT LOAN.
> ***
> 1.26 Soft Costs: The costs relating to the Project or the Project Loan, including but not limited to, Borrower's legal fees and costs, marketing expenses, and leasing and brokerage commissions, which are not "costs of an improvement" (as such term is defined in Section 2(5) of the New York Lien Law), as itemized in the Budget.
> ***
> 2.2 Advances Generally, (o): Advances of the Project Loan are to be applied solely to Soft Costs in accordance with the Budget. Lender shall have no obligation to permit use of proceeds of the Project Loan for any other purpose.

Lender 2 also cites to Schedule B, a line item budget which sets forth certain expenses characterized by Lender 2 as non-construction related (*Lender 2 Agreement* pp 32-34).

Lien Law § 2(4) defines "improvement" broadly as:

> the demolition, erection, alteration or repair of any structure upon, connected with, or beneath the surface of, any real property and any work done upon such property or materials furnished for its permanent improvement, and shall also include any work done or materials furnished in equipping any such structure with any chandeliers, brackets or other fixtures or apparatus for supplying gas or electric light and shall also include the drawing by any architect or engineer or surveyor, of any plans or specifications or survey, which are prepared for or used in connection with such improvement and shall also include the value of materials actually manufactured for but not delivered to the real property, and shall also include the reasonable rental value for the period of actual use of machinery, tools and equipment and the value of compressed gases furnished for welding or cutting in connection with the demolition, erection, alteration or repair of any real property, and the value of fuel and lubricants consumed by machinery operating on the improvement, or by motor vehicles owned, operated or controlled by the owner, or a contractor or subcontractor while engaged exclusively in the transportation of materials to or from the improvement for the purposes thereof and shall also include the performance of real estate brokerage services in obtaining a lessee for a term of more than three years of all or any part of real property to be used for other than residential purposes pursuant to a written contract of brokerage employment or compensation.

Similarly, Lien Law § 2(5) the "cost of improvement" includes myriad expenditures:

> expenditures incurred by the owner in paying the claims of a contractor, an architect, engineer or surveyor, a subcontractor, laborer and materialman, arising out of the improvement, and in paying the amount of taxes based on payrolls including such persons and withheld or required to be withheld and taxes based on the purchase price or value of materials or equipment required to be installed or furnished in connection with the performance of the improvement, payment of taxes and unemployment insurance and other contributions due by reason of the employment out of which any such claim arose, and payment of any benefits or wage supplements or the amounts necessary to provide such benefits or furnish such supplements, to the extent that the owner, as employer, is obligated to pay or provide such benefits or furnish such supplements by any agreement to which he is a party, and shall also include fair and reasonable sums paid for obtaining building loan and subsequent financing, premiums on bond or bonds filed pursuant to section thirty-seven of this chapter or required by any such building loan contract or by any lease to be mortgaged pursuant thereto, or required by any mortgage to be subordinated to the building loan mortgage, premiums on bond or bonds filed to discharge liens, sums paid to take by assignment prior existing mortgages, which are consolidated with building loan mortgages and also the interest charges on such mortgages, sums paid to discharge or reduce the indebtedness under mortgages and accrued interest thereon and other encumbrances upon real estate existing prior to the time when the lien provided for in this chapter may attach, sums paid to discharge building loan mortgages whenever recorded, taxes, assessments and water rents existing prior to the commencement of the improvement, and also those accruing during the making of the improvement, and interest on building loan mortgages, ground rent and premiums on insurance likewise accruing during the making of the improvement. The application of the proceeds of any building loan mortgage or other mortgage to reimburse the owner for any payments made for any of the above mentioned items for said improvement prior to the date of the initial advance received under the building loan mortgage or other mortgage shall be deemed to be an expenditure within the "cost of improvement" as above defined; provided, however, such payments are itemized in the building loan contract and/or other mortgage other than a building loan mortgage, and provided further, that the payments have been made subsequent to the commencement of the improvement.

Lender 2 argues that the line item budget contained in Schedule B to the Lender 2 Agreement "does not contain any provision for the payment of any … improvements or costs of

improvements," and "concern costs unrelated to any improvements or costs of improvements" (*Lender 2 Memo* p 19). In support, Lender 2 cites to numerous cases which are readily distinguishable because, unlike the situation here, they do not bear even a tenuous connection to construction (*see e.g. Weisman v Maksymowicz*, 109 AD3d 768, 768 [1st Dept 2013] [showering and having a barbecue with neighbors in the name of "community relations" and "ordinary yard work" do not constitute improvements]; *Negvesky v United Interior Resources, Inc.*, 32 AD3d 530, 531 [2d Dept 2006] ["The installation of modular workstations provided by the appellant does not qualify as an 'improvement'" because "the appellant not demolish, erect, or alter any structure, nor did it perform work or furnish materials for its permanent improvement"]; *Claudio Perfetto, Inc. v Waste Mgt., L.L.C.*, 274 AD2d 389, 390 [2d Dept 2000] ["mere acceptance of construction debris or waste does not constitute an "improvement"]; *Chase Lincoln First Bank N.A. v NY State Elec. & Gas Corp.*, 182 AD2d 906, 907 [3d Dept 1992] ["cutting, trimming, clearing, disposing and chemically treating of trees and vegetation around ... electrical utility lines and poles, do not qualify as an 'improvement'" because the party engaging in that activity "did not demolish, erect or alter any structure, nor did it perform work or furnish materials for the permanent improvement of such easements"]; *270 Greenwich St. Assoc. LLC v Patrol & Guard Enters., Inc.*, 2010 NY Slip Op 31667[U], *6 [Sup Ct, NY County 2010, Goodman, J.] ["...security guard services did not directly permanently improve the Property and, hence, are not lienable."]).

Rather, as Banta and Plaintiff argue in opposition, the Lender 2 Agreement contains various provisions which are, at best, contradictory or ambiguous regarding the Agreement's connection to "improvement" or "costs of improvement," and thus do not "utterly refute" the non-movants' contentions. For example, among other things, numerous provisions explicitly contemplate the use of Lender 2 Agreement disbursements to, at minimum, facilitate improvements:

- "Budget" is defined as the "Borrower's estimate of the *cost to renovate the Improvements as indicated on Schedule B* attached hereto, which estimate was previously delivered to Lender, as the same may be revised from time to time with Lender's approval in accordance with the terms of this Agreement" (¶ 1.2 [emphasis added]).
- "Project" is defined as "The Property together with the Improvements" (¶ 1.21).
- With respect to advances, the Agreement provides that the "Lender shall not be required to make Advances for building materials that have not been incorporated into the Improvements," unless certain conditions are satisfied; in other words, the Agreement explicitly contemplates that an advance could be made for building materials (¶ 2.2[f]; *see also* ¶ 2.2[i] ["If Lender, Lender's Consultant or Title Company shall so require, Borrower shall submit with its Requisitions lien waivers or other similar certifications in form satisfactory to Lender and Title Company showing amounts paid and amounts due to all persons or organizations furnishing labor or

materials in connection with the completion of the Improvements"]).

- One condition for an advance is that the "Borrower shall provide evidence to Lender that the proceeds of the most recent previous Advance hereunder have been applied to Soft Costs, *and otherwise to construct the Improvements*, subject to Lender's confirmation and approval in its sole discretion (¶ 2.3[i] [emphasis added]).
- The final advance requires that the "Lender and Lender's Consultant shall have received a signed and sealed "as-built" survey of the Project dated within ten (10) days of the proposed Funding Date certified to Lender and Title Company, and showing the completed Improvements," that "Lender . . . receive[s] a completed AIA Form G704 signed by the Architect, Construction Manager, and Borrower evidencing that the Construction Work has been completed []," and that "Lender...shall have received written certification from Lender's Consultant that the Construction Work has been one hundred (100%) percent completed in accordance with the plans and specifications of the Project" (¶¶ 2.4[a], [c], and [d]).

Other provisions—including the line item budget highlighted by Lender 2—invoke the use of an architect and construction manager. For example,

- The line item budget discusses $18,000 for a "Lender ongoing construction consultant" (p 34)
- One condition for an advance is that the Lender and Lender's Consultant "shall have each received...lien waivers for all Soft Costs that were included in any prior Advances and invoices for all Soft Costs proposed to be included in the applicable Advance and (ii) an application and certificate for payment (AIA G702) signed by the Architect and Construction Manager, along with a completed continuation sheet (AIA G703)" (¶ 2.3[a]).
- Another condition is that "[i]f payment or reimbursement is being requested for any Soft Costs, *or any fees of architects and engineers, or construction management fees*, and if specifically requested by Lender, Lender shall have received a written statement from Lender's Consultant,...the amount of any fees of architects and engineers, or construction management fees, that have been incurred by Borrower, (ii) the estimated total Soft Costs (broken down by Line Item) necessary to complete the Construction Work in accordance with the Budget, (iii) whether all municipal governmental agency inspections that should have occurred with respect to the completed construction have occurred, and (iv) whether the completed construction has been performed in a good and workman like manner and in accordance with the Budget" (¶ 2.3[b]).

A "building loan agreement is an agreement by which one undertakes to advance another money to be used primarily in the erection of a building and not merely to pay existing mortgages and bonuses to the lender for making the loan" (*Pawling Savings Bank v Jeff Hunt Properties, Inc.*, 225 AD2d 678, 679 [2d Dept 1996]). Where, as here, there exists an "express promise of an owner to make an improvement upon real property," there exists a building loan agreement subject to the additional recording requirements of Lien Law § 22 (*Lehman Bros. Holdings, Inc. v 25 Broad, LLC*, 2011 NY Slip Op 31931[U], *17 [Sup Ct, NY County 2011, Goodman, J.] [finding "no evidence of any express promise (or of a continuing promise)...made by the owner to improve the real property," in part because "all of the funds to be advanced in 1996 under the building loan mortgage dated August 14, 1996, were already advanced."]).

Affording, as the Court must, a "liberal construction" to the Lien Law, the Court finds that the documentary evidence does not "utterly refute" the allegations by Plaintiff and Banta that the Lender 2 Agreement, despite Lender 2's characterization, is a "building loan agreement" (*see Matter of Old Post Rd. Assoc., LLC v LRC Constr., LLC*, 177 AD3d 658, 660 [2d Dept 2019], citing Lien Law § 23 [holding that a construction management firm employing construction professionals, architects, and engineers which, in addition to the consulting services it rendered, also prepared site logistics and access plans for the property, and performed a constructability review for the project at the property, qualifies as having performed an "improvement if the site logistics, access plans, or constructability review included drawings by an architect or engineer, even if such were prepared preconstruction"]). Accordingly, the branch of Lender 2's motion seeking dismissal is denied.

To the extent that multiple parties also seek that the Court determine lien priority, including the priority of Banta and Plaintiff's liens relative to the Lender 1 mortgage in the related action before Justice Goetz, it is simply too early, at this juncture, to make that determination; as the non-movants themselves argue, the record is insufficient. Moreover, the actions are consolidated only for joint trial, and thus this Court is not empowered to make a determination in this action which may bear on Action 1 before Justice Kahn.

II. Lien Law § 13

Lender 2 argues, in the alternative, that even if the Lender 2 Mortgage was recorded after Banta or Plaintiff had commenced work at the property, documentary evidence establishes that the Lender 2 Mortgage would still have priority over their notices of mechanic's lien because: (1) Lender 2 made the last of the Advances under the Lender 2 Agreement on June 26, 2017, more than eight months before the lien notices; (b) the Lender 2 Mortgage was recorded before the deadlines to file their lien notices expired; and (c) the Lender 2 Mortgage contains the trust funds covenant set forth in New York Lien Law §§ 13(2) and (3) (*NYSCEF 71* pp 18-19). Neither Banta nor Plaintiff address this argument in their opposition.

Nevertheless, while Lender 2's timeline is correct regarding the advances in relation to the commencement of work and filing of the mechanic's liens, Lender 2 relies selectively upon Lien law § 13(2), which provides, as relevant here, that:

> When a building loan mortgage is delivered and recorded a lien shall have priority over advances made on the building loan mortgage after the filing of the notice of lien; but such building loan mortgage, whenever recorded, to the extent of advances made before the filing of such notice of lien, shall have priority over the lien, provided it or the building loan contract contains the covenant required by subdivision three hereof, **and provided the building loan contract is filed as required by section twenty-two of this chapter.** *Every mortgage recorded subsequent to the commencement of the improvement and before the expiration of the period specified in section ten of this chapter for filing of notice of lien after the completion of the improvement shall, to the extent of advances made before the filing of a notice of lien, have priority over liens thereafter filed if it contains the covenant required by subdivision three hereof.*

Lender 2 cites only the italicized portion, omitting the preceding portion requiring that the associated building loan contract be filed pursuant to Lien Law § 22. Because, as discussed above, this did not occur, the remainder of Lien Law § 13(2) is inoperative, and Lender 2's alternative argument is also unavailing.

CONCLUSION/ORDER

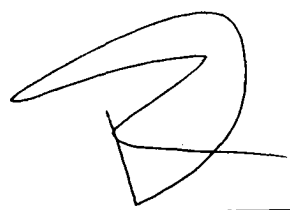
Based on the above, it is

ORDERED that the motion of Defendant 11 West 126th Street Lender 2 LLC to dismiss (sequence 002) is **DENIED**; and it is further

ORDERED that within 30 days, Plaintiff shall e-file and serve a copy of this order with notice of entry upon all parties; and it is further

ORDERED that within 30 days, the parties shall email David Solomkin (dsolomki@nycourts.gov) to schedule a discovery conference in this matter.

This constitutes the decision and order of the Court.



12/15/2020
New York, NY

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:		CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
		GRANTED	[X] DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE