SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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ORCHARD HOTEL, LLC,SIMON MILLER,

Plaintiff,

- v -

D.A.B. GROUP LLC,CAVA CONSTRUCTION & DEVELOPEMENT, INC.,FLINTROCK CONSTRUCTION SERVICE LLC,JJ K MECHANICAL INC.,EDWARD MILLS & ASSOCIATES, ARCHITECTS PC,CASINO DEVELOPEMENT GROUP, INC, CITYWIDE CONSTRUCTION WORKS INC.,EMPIRE TRANSITMIX INC.,MARJAM SUPPLY CO., ROTAVELE ELEVATOR INC.,SMK ASSOCIATES INC.,FJF ELECTRICAL CO. INC.,CITY OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JOHN DOE # 1 THROUGH JOHN DOE # 100, BROOKLY FEDERAL SAVINGS BANK, STATE BANK OF TEXAS,

Defendant.

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INDEX NO. 850044/2011

MOTION DATE 05/13/2020

MOTION SEQ. NO. 022

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 022) 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1081, 1082, 1083, 1084, 1085, 1086, 1087

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, (i) the cross-claim defendants Brooklyn Federal Savings Bank (**BFSB**) and State Bank of Texas's (**SBT**) motion for summary judgment pursuant to CPLR 3212 dismissing all claims in Flintlock Construction Services LLC's (**Flintlock**) first cross-claim against them and for costs and disbursements is granted with respect to SBT and as set forth below only and otherwise denied, and (ii) the cross motion by Flintlock pursuant to CPLR 3025(b) for leave to file a second amended verified answer & cross claims is granted with respect to the punitive damages aspect against BFSB only.

RELEVANT FACTS AND CIRCUMSTANCES

This action was commenced as a mortgage foreclosure action concerning two mortgages originated by defendant Brooklyn Federal Savings Bank (**BFSB**) against real property formerly owned by defendant D.A.B. Group LLC (**DAB**). The first of these mortgages concerned funds to purchase a certain property in 2007 and the second was a building loan issued in 2008 for construction work on the same property (*see* NYSCEF Doc. Nos. 1022-1029 for the complete **Loan Documents**). Pursuant to the terms of the Loan Documents, the final maturity date, after extensions, was March 1, 2011.

After an initially unsuccessful bid to be the general contractor in the summer of 2008, Flintlock was hired by DAB as the general contractor for construction on the property in 2010 to complete the general contracting services of its predecessor, Cava Construction & Development, Inc. (**Cava**). Flintlock claims that it was advised that DAB was in the process of securing consent from BFSB for Flintlock to be approved to commence construction and "that certain funds from the construction loan were used to pay Cava, but that sufficient remaining funds were available to pay Flintlock to complete the job" (NYSCEF Doc. No. 1020, ¶ 81). Accordingly, Flintlock signed a contract with DAB dated March 30, 2010, in the total sum of $13 million, which afforded it 430 calendar days to complete the work required under that contract (*id.*, ¶ 83). In connection with its approval of Flintlock, BFSB retained Christopher Koch of Koch Engineering as its representative, and Mr. Koch is alleged to have affirmatively represented to Flintlock that BFSB's consent was required so that "loan monies could be advanced to DAB under their legal documents" and DAB, thus, requested that Flintlock cooperate with Mr. Koch and BFSB in securing the necessary "approval" (*id.*, ¶¶ 87-89). Flintlock was also contacted by counsel for

BFSB "in connection with the documentation required in order to secure BFSB's consent to Flintlock taking over the work from defaulted contractor Cava" (*id.*, ¶ 90). In the course of its communications with BFSB's representatives, Flintlock learned that "because of a lien filed by a prior defaulted contractor, Cava[,] that an issue arose as to the availability of the full contract funds to pay Flintlock under their contract with DAB" (*id.*, ¶ 94). Flintlock negotiated with BFSB representatives and agreed to "defer" $960,000 of available loan monies from BFSB to afford DAB the opportunity to "resolve the Cava lien" (*id.*, ¶ 95).

On or about August 20, 2010, Flintlock was presented with a number of documents to sign to secure BFSB's approval, including an estoppel certificate. The estoppel certificate was prepared by BFSB and executed by Flintlock on August 26, 2010. On August 26, 2010, BFSB approved the construction contract between DAB and Flintlock, well-aware that this contract afforded Flintlock 430 days from the date of commencement to complete the work, notwithstanding the fact that unbeknownst to Flintlock, the DAB building loan note "stated that the loan was set to expire on the Second Extension Maturity Date of September 1, 2010, ***only five (5) days after Flintlock signed the Estoppel Certificate***" (*id.*, ¶ 105 [emphasis added]). The estoppel certificate, however, misleadingly stated that, "[t]he sum of $12,040,000 is available to Contractor [Flintlock] which sum may be increased by the amount, if any, by which the Cava Construction mechanic's lien is resolved, to the satisfaction of the Lender [BFSB] for a sum less than $960,000…," (*id.*, ¶ 106; NYSCEF Doc. No. 1030]. In other words, per the express language of the mechanic's lien, and as Flintlock alleges it understood, the sum of $12,040,000 ***may actually be increased*** if the Cava mechanic's lien were resolved. In fact, Flintlock alleges, this sum was never going to be "available" to it and BFSB intentionally concealed the fact that

funding would cease on the maturity date of the loan, which date would undoubtedly precede completion of Flintlock's work on the project, and at the time that BFSB approved Flintlock such time was actually set to expire within less than a week's time (*id.*, ¶¶ 107-108). After Flintlock commenced work, and again unbeknownst to Flintlock, BFSB extended the loan to March 1, 2011 as a final extension (*id.*, ¶¶ 109-110). Once the loan reached its maturity date, BFSB had no legal obligation to further extend the loan in order for DAB to pay Flintlock after March 1, 2011 notwithstanding the fact that Flintlock's work under the contract that BFSB approved could not have possibly been completed by that date.

Flintlock alleges that had it known about BFSB's misrepresentations and omissions with respect to the funds available, it would never have commenced work since there were no confirmed funds available to pay for all of its work (*id.*, ¶ 114). Additionally, as further discussed in connection with Flintlock's cross motion to amend, Flintlock claims that at no time prior to DAB's default on March 1, 2011, did BFSB or DAB ever advise Flintlock to stop working because no funds would be available to pay for the work it was performing, and, in fact, after the default but prior to Flintlock learning of the default, Mr. Koch "confirmed that Flintlock's Requisition No. 8 for work performed prior through February 10, 2011 was being processed" and "[a]s late as March 22, 2011 BFSB [] confirmed Flintlock would be paid (Weiss Aff., NYSCEF Doc. No. 1049, ¶¶ 31- 32; NYSCEF Doc. Nos. 1068-69). Flintlock was never paid for all of the work that it performed on the property.

In support of its claim of fraud (NYSCEF Doc. Nos. 1043, ¶ 16; 1020, ¶¶ 78-128), Flintlock alleges (i) that BFSB intentionally prevented it from gaining access to the underlying loan

documents by wrongfully withholding the same and by insisting upon execution of the estoppel certificate in a compressed time period so that Flintlock would be unable to independently obtain or review it, and (ii) that it repeatedly sought assurances from BFSB regarding the sufficiency of loan funds during its contract term and understood the estoppel certificate to be a confirmation that the funds were sufficient.

Previously, this court (Ramos, J.) denied BFSB and SBT's motion to dismiss the first counterclaim for fraud, which denial was affirmed by a decision of the Appellate Division, First Department dated May 16, 2019 (the **Appellate Division Decision**; NYSCEF Doc. No. 1084). Rejecting the position taken by BFSB, the Appellate Division Decision held that even though BFSB was not a signatory to the estoppel certificate, the allegations that the estoppel certificate "was prepared solely by BFSB and that BFSB advised Flintlock that execution of it was a condition of being hired" are sufficient to conclude that BFSB "effectively made the statements reflected in the Certificate" (*id.*, 172 AD3d 530 [1st Dept 2019]).

The Appellate Division Decision further explained that Flintlock's allegations in this action are also:

> sufficient to permit an inference that Flintlock justifiably relied on the Estoppel Certificate, notwithstanding its failure to read the referenced loan documents, especially in view of Flintlock's allegations that it sought assurances from BFSB regarding the sufficiency of loan funds during the contract term and understood the statement in the Estoppel Certificate to be a confirmation that the funds were sufficient (see *ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045). Flintlock would have been required to make "additional inquiry" if it had had "hints of [a misrepresentation's] falsity" (*Loreley Fin. [Jersey] No. 3, Ltd. v Morgan Stanley & Co. Inc.*, 146 AD3d 683, 684 [1st Dept 2017] [internal quotation marks omitted]). The Lenders do not identify any such "hints."

> These allegations are also sufficient to permit an inference that ***BFSB had a duty to disclose information to Flintlock pursuant to the special facts doctrine*** (*see P.T. Bank,* 301 AD2d at 378, 754 N.Y.S.2d 245). The cases cited by the Lenders are distinguishable, because they involved a party's failure to read materials provided to it or to request materials that were indisputably available (*see UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88–89, 733 N.Y.S.2d 385 [1st Dept 2001]; *Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 99[1st Dept 1997]; *88 Blue Corp. v. Reiss Plaza Assoc.*, 183 AD2d 662, 664 [1st Dept 1992]).
>
> Flintlock's allegations are also sufficient to permit an inference that ***BFSB was aware that Flintlock was operating under the mistaken assumption that the funds were available throughout the contractual term***, a fact that, if true, would also support a finding that BFSB owed Flintlock a duty of disclosure

(NYSCEF Doc. No. 1084, 172 AD3d at 531-33 [emphasis added]).

To the extent that the estoppel certificate states that BFSB had "no obligation to provide any Advances … except as provided for in the Building Loan Agreement," the Appellate Division Decision explained that this is a "half-truth" and insufficient "to 'save' the statement of fund availability" (172 AD3d at 532). This, of course, makes sense because every construction lender's obligation to make loan advances is limited by the terms of the loan documents. What would generally be understood by this language is that certain back-up documentation required in the loan documents would need to be satisfied prior to an advance. To wit, there was nothing in the estoppel certificate to give the "hint" that the loan would mature prior to the term of the very contract that lender was approving in requiring the estoppel certificate and as such the statement of fund availability was an actionable "half-truth".

Following the Appellate Division Decision, the parties engaged in discovery. Steven A. Weiss, Jr., the Flintlock representative, testified at his deposition that although he never asked for the loan documents before signing the estoppel certificate, he "relied on the numbers and the

statement that the sum of 12 million 40,000 is available to contractor" (NYSCEF Doc. No. 1036 at 97-100), which he understood to mean for the contract term.

SBT now moves for summary judgment dismissal of the cross claim against it arguing that the first cross claim has not been stated, and BFSB moves for summary judgment of dismissal against it arguing that it had no duty to disclose with respect to an estoppel certificate barring special facts, which it argues are not present here. BSFBs' argument fails. Critically, BFSB does not submit any deposition testimony or affidavit to suggest that it either disclosed the information about the loan maturity date to Flintlock or that it was at least unaware of Flintlock's mistaken understanding that the funds would be available to complete the contract based on BFSB's representations including those set forth in the estoppel certificate. Flintlock, among other things, cross moved to add a claim for punitive damages.

DISCUSSION

1. Motion for Summary Judgment

On a motion for summary judgment, the burden is on the movant to "make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets its burden, the opposing party must then "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" that its claim rests upon (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

As an initial matter, the motion for summary judgment is granted with respect to SBT as all of the allegations made by Flintlock in support of its fraud claims concern BFSB only (e.g., Weiss Aff., NYSCEF Doc. No. 1049, ¶ 6). There is not a single allegation as it relates to SBT's involvement in the alleged statement set forth in the estoppel certificate or any other statement by SBT upon which Flintlock materially relied.

With respect to BFSB, the motion for summary judgment is granted only insofar as the cross claim concerns allegations that BFSB hindered Flintlock's ability to obtain the loan documents. As a factual matter, Mr. Weiss's testimony makes clear that Flintlock never asked for them. Thus, inasmuch as the Appellate Division Decision sustained the fraud claim at the CPLR 3211 stage as it related to allegation that BFSB intentionally prevented Flintlock from accessing such documents, this aspect of the claim is dismissed.

BFSB, however, has failed to meet its burden of showing *prima facie* entitlement to summary judgment dismissal of the remainder of the cross claim. The Appellate Division Decision indicated that the allegations supported the notion that BFSB was aware that Flintlock had the misunderstanding that over $12 million would be available for payment during the contract term and that, as such, it had a duty to correct this misunderstanding. Mr. Weiss' testimony corroborates the allegations that Flintlock relied on the estoppel certificate and had this misunderstanding. BFSB has simply not come forward with any evidence that Flintlock did not have this understanding, that BFSB did not reasonably understand that Flintlock had this misunderstanding or that BSFB otherwise met its disclosure obligation in correcting this misunderstanding. The fact that Mr. Weiss did not ask a lawyer to review the estoppel

certificate is of no moment. As the initial burden rests with the movant on a motion for summary judgment and BFSB has failed to meet this burden, its motion to dismiss this cross claim in its entirety is denied.

2. *Cross Motion to Amend*

Leave to amend under CPLR § 3025 (b) is committed to the sound discretion of the trial court (*Colon v Citicorp Inv. Servs.,* 283 AD2d 193, 193 [1st Dept 2001]) and should be freely given absent prejudice or surprise resulting from the delay to the opposing party or if the proposed amendment is "palpably improper or insufficient as a matter of law" (*McGhee v Odell,* 96 AD3d 449, 450 [1st Dept 2012]).

An award of punitive damages is warranted where the conduct of the party being held liable "evidences a high degree of moral culpability, or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence or recklessness" (*Buckholz v Maple Garden Apts., LLC*, 38 AD3d 584, 585 [2d Dept 2007]).

Here, the proposed amendment is sufficient insofar as it seeks to assert punitive damages against BFSB based on allegations that BFSB not only knew of Flintlock's mistaken understanding, but actively encouraged such misunderstanding and permitted it to continue while Flintlock performed work on the project even after funds were no longer available to pay for its work and even after the default already occurred and BFSB indisputably knew that no additional funds could or would be available to pay Flintlock for its work. In other words, BFSB's conduct was intentional, deliberate and reckless as:

> 5. To add insult to injury, BFSB, while Flintlock was working, and BFSB had absolute knowledge that it would not renew DAB's loan, BFSB continued to go through the requisition process by sending its consulting engineer down to the site; approving Flintlock's payment requisitions; and enticing Flintlock to continue working knowing the full time that the DAB loan would expire and BFSB would not renew the loan; therefore "stiffing" Flintlock for the improvements it was making to the property.

(NYSCEF Doc. No. 1049, ¶ 5).

In support of these allegations, Flintlock offers a number of emails, including an email dated March 6, 2011 from Mr. Koch, indicating that the requisition request was received with the conditional lien waiver and calling for an updated construction schedule, an owner's sworn statement, etc., (NYSCEF Doc. No. 168) and an email dated March 30, 2011 from Joanne Gallo at BFSB (NYSCEF Doc. No. 1069) telling Flintlock to "make arrangements for a safety site person at the Orchard street property" and that "[u]pon receipt of the invoice Brooklyn Federal will pay Flintlock the amount owed." All this is sufficient for Flintlock to meet its burden on a CPLR § 3025(b) motion to amend to assert a punitive damages against BFSB (*see 11 Essex Street Corp. v Tower Ins. Co. of NY*, 81 AD3d 516 [1st Dept 2011]).

However, the proposed amendment is insufficient as it concerns SBT since Flintlock simply fails to state any basis to assert a fraud claim against SBT. The cross motion with respect to SBT is, therefore, denied.

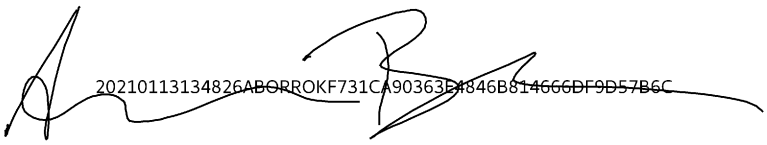
Accordingly, it is

ORDERED that the motion for summary judgment is granted in part as set forth herein and the first counterclaim is dismissed against State Bank of Texas and is otherwise denied, and it is further

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

ORDERED that the cross motion to amend is granted with respect to the addition of punitive damages only, and that Flintlock is directed to serve an amended pleading within ten days of this decision and order accordingly, and it is further

ORDERED that the parties are directed to appear for a remote pretrial conference on **February 15, 2021 at 11 AM.**



1/13/2021
DATE

ANDREW BORROK, J.S.C.

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