[*1]

Natixis, N.Y. Branch v 20 TSQ Lessee LLC
2021 NY Slip Op 50249(U)
Decided on March 4, 2021
Supreme Court, New York County
Cohen, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on March 4, 2021

Supreme Court, New York County

Natixis, New York Branch, CATHAY LIFE INSURANCE CO., LTD., NONGHYUP BANK, NONGHYUP BANK NEW YORK BRANCH, NONGHYUP BANK, NONGHYUP BANK, KEB HANA BANK NEW YORK AGENCY, HAREL - 20 TIMES SQUARE - GENERAL PARTNERSHIP, CHANG HWA COMMERCIAL BANK, LTD., LOS ANGELES BRANCH, CHINA MERCHANTS BANK CO., LTD., NEW YORK BRANCH, VIOLET PROTECTED ASSET SPC, Plaintiffs,

against

**20 TSQ Lessee LLC, 20 TSQ SIGN LLC, MARK SIFFEN, BURO HAPPOLD CONSULTING ENGINEERS, P.C., NAVILLUS TILE, INC., KINGS COUNTY WATERPROOFING CORP., FACADE TECHNOLOGY, LLC, SERVICE GLASS & STORE FRONT CO., INC., SIGNATURE METAL & MARBLE MAINTENANCE, L.L.C., HARDER SERVICES, INC., METAL SALES CO., INC., FACADE MAINTENANCE SYSTEMS LLC, TEXAS SCENIC COMPANY, INC., PENGUIN MAINTENANCE AND SERVICES, INC., SOLAR ELECTRICAL SYSTEMS, INC., CORD CONTRACTING CO., INC., AF SUPPLY CORPORATION, SAFWAY ATLANTIC, LLC, TREX COMMERCIAL PRODUCTS, INC., B.A.C.C. BUILDERS INC., 20 TSQ GROUNDCO LLC, CNY CONSTRUCTION 701 LLC, ZURICH AMERICAN INSURANCE COMPANY, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, MAEFIELD DEVELOPMENT INC., JOHN DOES 1-100, THEIR HEIRS, DEVISEES AND PERSONAL

REPRESENTATIVES AND HIS, THEIR OR ANY OF THEIR SUCCESSORS IN RIGHT, TITLE AND INTEREST, THE NAMES OF THE LAST ONE-HUNDRED, DEFENDANTS BEING UNKNOWN TO PLAINTIFFS, THE PERSONS OR PARTIES, R & S UNITED SERVICES, INC. S/H/A JOHN DOE, Defendants.

850272/2019

Counsel for Plaintiffs:

Steven Sinatra

Daniel R. Milstein

Michael P. Manning

GREENBERG TRAURIG, LLP

200 Park Avenue

MetLife Building

New York, New York 10166 Counsel for Borrower Defendants:

Marc E. Kasowitz

Gavin D. Schryver

Julianne Laporte

C. Nathaniel Myers

KASOWITZ BENSON TORRES LLP

1633 Broadway

New York, New York 10019

Joel M. Cohen, J.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 236, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 292, 293, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 328, 352, 362 were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 306, 307, 324, 326 were read on this motion to DISMISS CROSS-CLAIMS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 354, 355, 356, 357, 358, 359, 360, 361, 364, 365, 366, 367 were read on this motion for LEAVE TO INTERVENE.

This is a mortgage foreclosure action. Plaintiffs, a group of lenders,[FN1] provided a $650 million upfront loan to the borrowers in 2018 in connection with a real estate development project in Times Square, secured by a leasehold interest in the Times Square property. The borrowers admit to defaulting under the terms of the loan, multiple times. They twice renegotiated with the lenders to avoid enforcement of the defaults, then defaulted twice more. They have failed to satisfy key conditions underlying the loan, such as achieving timely, lien-free completion of the project, replenishing certain reserve accounts, and securing a major retail [*2]tenant to anchor the property. The borrowers do not allege the defaults were inadvertent, nor have they cured them. Now the lenders seek foreclosure.

The three motions before the Court radiate outward from this core dispute. In *Motion Sequence 002*, the lenders seek summary judgment to foreclose on the mortgage, which implicates not only the borrowers' interests but also the interests of other defendants who hold mechanic's liens against the property. At issue in *Motion Sequence 003*, meanwhile, are cross-claims for damages asserted by one of those mechanic's lienors against the property's lessee and fee owner entities. Finally, another mechanic's lienor seeks to intervene as a party defendant in *Motion Sequence 005*.

For the reasons set forth below, the lenders' motion for summary judgment is granted in large part, with the exception of one prong of the requested relief seeking discontinuance against one of the mechanic's lien defendants (*see* Part I, *infra*); the TSQ defendants' motion to dismiss two of Texas Scenic's cross-claims is granted (*see* Part II, *infra*); and the motion to intervene is denied without prejudice to that party seeking to intervene in a severed action contesting just the various third-party claims and cross-claims (*see* Part III, *infra*).

FACTUAL BACKGROUND [FN2]

A. Borrowers Obtain the Loan

At the heart of Times Square, the property located at 701 Seventh Avenue in Manhattan (the "Property" or the "Project") is home to a 42-story Marriott hotel and about 75,000 square feet of retail space, crowned by a mammoth high-definition LED sign (Pls.' Statement of

Undisputed Material Facts ["SUMF"] ¶3 [NYSCEF 182]; Affidavit of Mark Siffin ["Siffin Aff."] ¶4 [NYSCEF 259]). Construction on the Project began back in 2013 (Siffin Aff. ¶7). In the spring of 2018, the Property's owner was looking for a loan. At that time, the hotel had not yet opened and much of the retail space remained unleased (Affidavit of Michael Zanolli ["Zanolli Aff."] ¶4 [NYSCEF 216]). The owner, non-party Maefield Development, sought refinancing to buy out its investment partners on the Project, and retire existing Project debt (*id.* ¶¶4, 12). To that end, Maefield Development turned to Natixis, which agreed to underwrite a loan (*id.*).

On April 27, 2018, Natixis and a syndicate of co-lenders (collectively, "Lenders") loaned $650,000,000 to TSQ Lessee and TSQ Sign (collectively, "Borrowers"), pursuant to a Loan Agreement and other Loan Documents (SUMF ¶1; Borrowers' Resp. to SUMF ¶4 [NYSCEF 258]). TSQ Lessee holds a 99-year ground lease on the Property from 20 TSQ GroundCo LLC, the entity that now owns the Property (SUMF ¶3; Siffin Aff. ¶5). That ground lease, together with the building and improvements located on the Property, served as security for the Loan (SUMF ¶3). As additional security, Mark Siffin, a principal of Maefield Development, executed a non-recourse guaranty (the "Guaranty") (*id.* ¶5). Siffin holds an indirect majority interest in TSQ Lessee and TSQ Sign and holds an indirect 100% interest in 20 TSQ GroundCo LLC (*id.* at 1; Siffin Aff. ¶¶1, 5).

It is undisputed that Borrowers duly executed the Notes, Loan Agreement, and Mortgage (SUMF ¶6), and that Lenders are holders of the Notes, Loan Agreement, and Mortgage (*id.* ¶7). [*3]Further, it is undisputed that the entire $650 million original principal balance of the Loan was advanced at the closing (SUMF ¶8; Zanolli Aff. ¶13). Originally, the Loan was evidenced by eight promissory notes held by a syndicate of six co-lenders (SUMF ¶2; Zanolli Aff. ¶13). Over time, these interests splintered into additional notes held by additional co-lenders. Currently, the Loan is held by 11 Lenders (the Plaintiffs) with twenty-three notes (the "Notes") reflecting the combined $650 million amount (SUMF ¶2; Zanolli Aff. ¶13).

B. Lenders Condition the Loan on Project Benchmarks

This dispute implicates many provisions in the 175-page Loan Agreement (NYSCEF 261) and the subsequent amendments made to it, but before delving into specific terms, it is useful to summarize briefly the commercial context surrounding the transaction. When Lenders provided the Loan, the hotel was not yet open, and 40% of the retail space remained unleased. Borrowers' ability to pay debt service and operational costs during the term of the

Loan — not to mention their ability, ultimately, to repay the Loan itself — depended on the success of a business plan still in its preliminary stages (Zanolli Aff. ¶16). From Natixis's perspective, therefore, the Loan proceeds were going to finance "an incomplete project and a nascent business plan" (*id.* ¶¶4, 16).

As a result, the terms of the Loan addressed the perceived risks that come with funding a fledgling real estate development project. Borrowers expressly agreed that failure to achieve final, lien-free completion of the project by December 31, 2018 would constitute an Event of Default (Loan Agreement §§5.26, 8.1 [q]). And Borrowers also agreed to establish, and periodically replenish, separate reserve accounts to pay for debt service and operating expenses. In particular, the Loan Documents required: (i) a $75 million "Operating/Debt Service Reserve" from Loan proceeds, and (ii) a "Construction Reserve," expressly *not* to be funded with Loan proceeds, to cover the costs of completing lien-free construction (*id.* ¶¶9, 18).

Whenever the Operating/Debt Service Reserve balance fell below $20 million (the so-called Replenishment Trigger), Borrowers and Guarantor were obligated to make deposits sufficient to increase the balance to $30 million (Loan Agreement §§3.14, 10.1 [k]). And any time the balance in the Construction Reserve was determined to be insufficient to pay the remaining costs of achieving "Final Completion of the Project Improvements," Borrowers were obligated to deposit additional amounts in that account (Construction Reserve Agreement §6.1).

C. Borrowers' Defaults Lead to Sixth and Seventh Amendments to Loan Agreement

Borrowers Default under the Loan Agreement

Borrowers did not achieve Final Completion by December 31, 2018 (SUMF ¶20), causing an Event of Default under the Loan Agreement. Borrowers do not dispute that they failed to achieve Final Completion by the agreed date (Borrowers' Resp. to SUMF ¶20). According to Lenders, not only had Borrowers failed to obtain lien waivers from all Project contractors, numerous contractors were seeking a total of approximately $29 million for their prior services, and many had recorded (and others would subsequently record) mechanic's liens (Zanolli Aff. ¶19).

Moreover, by written notices sent in January and February 2019, Lenders notified Borrowers that they determined that the Construction Reserve held insufficient funds to achieve Final Completion, and that the failure to pay Deficiency Deposits totaling $24,294,930.18 (the "Current Deficiency Deposit") within ten days would constitute another Event of Default (SUMF ¶21). Borrowers did not make the Current Deficiency Deposit (*id.* ¶22), causing a [*4]second Event of Default.[FN3]

Meanwhile, the Marriott Edition hotel, which takes up the majority of the Property's space, opened for business on March 12, 2019 (Siffin Aff. ¶30; Zanolli Aff. ¶22). According to Natixis, however, the hotel "never generated positive cash flow for Borrowers," "much less the significant amounts necessary to pay debt service and carrying costs" (Zanolli Aff. ¶5). In any event, the hotel's opening did not bring Borrowers to "Final Completion," as defined under the Loan Agreement, due to the outstanding liens attached to the Property.

The Loan Agreement has been amended seven times (*id.* ¶9). Most pertinent here are the Sixth and Seventh Amendments.

The Sixth Amendment to the Loan Agreement

The Sixth Amendment was executed as of April 9, 2019, in order to induce Lenders to forbear from exercising remedies for Borrowers' existing defaults (SUMF ¶23). Pursuant to the Sixth Amendment, Borrowers covenanted to make the Current Deficiency Deposit and achieve Final Completion by June 30, 2019, and expressly agreed that failure to do either of those things would constitute an immediate Event of Default (*id.* ¶¶23, 25). In addition, Guarantor executed a Guaranty of Payment, dated as of April 9, 2019 (the "Deficiency Guaranty"), guarantying "the complete and prompt payment of the Current Deficiency Deposit . . . ." (*id.* ¶24).

But as the June 30, 2019 deadline for performance of the Sixth Amendment approached, Borrowers and Guarantor informed Lenders that they would not be able to achieve Final Completion of the Project Improvements or make the Current Deficiency Deposit by the agreed upon deadline (*id.* ¶26).

The Seventh Amendment to the Loan Agreement

Lenders, Borrowers, and Guarantor therefore entered into the Seventh Amendment, dated as of June 28, 2019 (*id.* ¶27). Pursuant to Section 1.5 of the Seventh Amendment, the Final Completion deadline was further extended to December 31, 2019; however, Borrowers were required to resolve all contractor claims except those asserted by Navillus and Façade Tech by September 9, 2019 (*id.* ¶28). Borrowers were also required to make the Current Deficiency Deposit (with the exception of the portion thereof attributable to claims made by contractors Navillus and Façade Tech) by September 9, 2019, and were required to pay the portion of the Current Deficiency Deposit attributable to the Navillus and Façade Tech claims by December 31, 2019 (*id.* ¶29).

Further, Borrowers and Guarantor presented to Lenders a signed letter of intent for a long-term lease for the entirety of the then-vacant retail space (the "Retail Lease") (*id.* ¶31). Pursuant to Section 1.6 of the Seventh Amendment, Borrowers agreed, *inter alia*, that failure to deliver a fully executed Retail Lease on substantially the terms set forth in the letter of intent by September 9, 2019 would also constitute "an immediate Event of Default" (*id.* ¶32). When the parties entered into the Loan Agreement, Borrowers were leasing part of the bottom floors of the Property to the "NFL Experience" (Siffin Aff. ¶14). But the NFL Experience terminated its lease in September 2018, leaving more than 90% of the retail space vacant and only a single retail tenant remaining (Zanolli Aff. ¶22). Since then, Borrowers had been pursuing other tenants to enter into a retail lease for the space (Siffin Aff. ¶14).

The September 2019 Default Notice

Once again, Borrowers and Guarantor defaulted. By written notice dated September 13, 2019, Lenders informed Borrowers that Events of Default existed under the Loan (SUMF ¶36; *see* NYSCEF 268 [written notice letter]). The notice identified three separate Events of Default: (1) failure to enter into the Retail Lease (*see* Seventh Amendment, §1.6); (2) failure to achieve Final Completion of the Project Improvements (excluding the two specifically excepted contractor claims) (*see* Loan Agreement, §8.1 [q]); and (3) failure to make replenishment payments into the Construction Reserve (SUMF ¶¶33-35).

Borrowers do not deny the existence of what they term "technical Events of Default" (Siffin Aff. ¶15) but doubt their significance. For example, Borrowers do not dispute that they "did not enter into the Retail Lease, or any other lease, by September 9, 2019," but explain they "are in advanced negotiations of obtaining a replacement . . . that will be even more beneficial for the Property" (Borrowers' Resp. to SUMF ¶35). In a similar vein, Borrowers do

not dispute that they failed to resolve open contractor claims by September 9, 2019, but state "that they are still in the process of resolving" them (*id.* ¶33). Nor do Borrowers dispute that they failed to make the Current Deficiency Deposit by September 9, 2019, but question "the amount of the Current Deficiency Deposit calculated by the Lenders" (*id.* ¶34).

D. Lenders Commence the Foreclosure Action

The Instant Action and Additional Events Default

On December 9, 2019, Lenders commenced the instant foreclosure action under Article 13 of the Real Property Actions and Proceedings Law ("RPAPL"), by filing a Summons and Complaint (NYSCEF 1-2).

Then on January 14, 2020, Lenders demanded that Borrowers replenish the Operating/Debt Service Reserve, which had fallen below the $20 million threshold, by depositing approximately $10 million (SUMF ¶¶38-39). Lenders assert that the Operating/Debt Service Reserve had been depleted by costly, but necessary, payments of ground rent and other operating expenses (*id.* ¶38). Borrowers respond that these "expenses" included unreasonable expenses that the Lenders paid to their advisors for unspecified and unnecessary work, and without notice to Borrowers, in violation of the Loan Agreement (Borrowers' Resp. to SUMF ¶38). Absent the payment of these expenses, Borrowers maintain, the balance in the reserve account would not have fallen below $20 million (*id.*). Borrowers did not pay any part of the replenishment amount demanded by Lenders (SUMF ¶40).

On January 30, 2020, Lenders declared a further Event of Default (*id.* ¶41). On February 14, Lenders filed an amended Complaint to reflect Borrowers' further default (NYSCEF 96). Other than Borrowers and Guarantor, the remaining Defendants named in the Complaint and, later, the Amended Complaint are contractors who have filed mechanic's liens against the Property (*see id.* ¶¶17-34). Under RPAPL §1311, "[e]very person having any lien or incumbrance upon the real property which is claimed to be subject and subordinate to the lien of the plaintiff" "shall be made a party defendant to the action." Accordingly, Lenders allege that these mechanic's liens are all "subject and subordinate to the lien of the Mortgage being foreclosed" (NYSCEF 96 ¶¶17-34). The issue of priority between the Mortgage and the mechanic's is discussed in Part II, *infra*. But the specifics about the mechanic's lienors' work on the Project is mostly irrelevant to these motions.

Court Conference and Attempt at Mediation

Shortly after Lenders filed the Amended Complaint, the COVID-19 pandemic grounded [*5]much of New York City to a halt. In the ensuing months, following a brief period when certain Court operations were temporarily suspended, commercial foreclosure actions that pre-dated the pandemic proceeded. In light of the pandemic's disruptive effects, however, on July 23, 2020, Chief Administrative Judge Lawrence Marks issued Administrative Order 157/20 (the AO), which required courts to hold "a status or settlement conference" with the parties to inquire into certain issues "[p]rior to conducting any further proceedings in any foreclosure matter."[FN4] Among other things, the AO required courts to "inquire into the effects, if any, that the COVID-19 pandemic has had upon the parties; . . . and use best efforts (including referral to alternative dispute resolution) to resolve any outstanding issues" (AO ¶4 [b]). Following such conference, "the court may . . . issue a decision on any motion, including a motion for foreclosure and sale" (AO ¶6). Notably, "[p]ending and newly-filed motions may be considered and decided in all foreclosure matters — including residential and commercial matters . . . and matters commenced prior to and during the COVID-19 pandemic" (AO ¶6).

On November 18, 2020, prior to hearing oral argument on the instant motions, the Court discussed the issues raised by various Executive Orders and the AO with the parties (NYSCEF 396 at 8-22 [Oral Arg. Tr.]). Then, at the conclusion of oral argument, the Court advised the parties that it would "take the motions back for consideration," and in the meantime, "direct[ed] the parties to ADR" to engage in "good-faith settlement discussions" (*id.* at 90). Accordingly, Lenders and Borrowers attempted mediation with Judge Jonathan Lippman (ret.) on January 5, 2021, but were unsuccessful in resolving the matter (NYSCEF 414 [Jan. 6, 2021 letter to Court]).

DISCUSSION

I. *PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT*

A. Summary Judgment against the Borrowers and Guarantor

"[W]hen there is no genuine issue to be resolved at trial, the case should be summarily decided" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). On a motion for summary judgment, "it is incumbent upon the [party opposing summary judgment] . . . to produce 'evidentiary

proof, in admissible form, sufficient to require a trial . . . mere conclusions, expressions of hope, unsubstantiated allegations or assertions are insufficient'" (*State Bank of Albany v Fioravonti*, 51 NY2d 638, 647 [1980], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The "presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment" (*American Savings Bank FSB v Imperato*, 159 AD2d 444, 444 [1st Dept 1990]). Likewise, a summary judgment motion may not be defeated by "arguments, and contentions 'based upon surmise, conjecture and suspicion'" (*Gray Mfg. Co. v Pathe Indus., Inc.*, 33 AD2d 739, 739 [1st Dept 1969], quoting *Shapiro v Health Ins. Plan of Greater NY*, 7 NY2d 56, 93 [1959], affd, 26 NY2d 1045 [1970]).

Lenders established a prima facie case in support of foreclosure. Entitlement to judgment of foreclosure as a matter law is warranted where the plaintiff provides "evidence of the note and mortgage, and proof of defendant's default" (*e.g.*, *PNC Bank, N.A. v Salcedo*, 161 AD3d 571, 571 [1st Dept 2018]; *Wilmington Trust v Sukhu*, 155 AD3d 591 [1st Dept 2017] ["Plaintiff established its prima facie entitlement to mortgage foreclosure as a matter of law, by producing the note, mortgage, assignment, and evidence of defendant's nonpayment"]). The [*6]validity of the Loan instruments is not in dispute: Borrowers duly executed the Notes, Mortgage and other Loan Documents (SUMF ¶¶1, 6-7; Borrowers' Resp. to SUMF ¶¶1, 6-7). Lenders have also submitted proof of Borrowers' defaults, including failure to achieve Final Completion of the Project Improvements by December 31, 2019, failure to resolve the deficiency in the Construction Reserve, and failure to secure the Retail Lease (SUMF ¶¶33-35). While Borrowers see these defaults as immaterial (as discussed below), they do not dispute that the defaults occurred (*see* Borrowers' Resp. to SUMF ¶¶33-35; Nov. 18, 2020 Oral Arg. Tr. at 68:18-23 [The Court: "[I]s there any dispute that there is a default under the lending agreement?" Mr. Kasowitz: "No."]). Under the express terms of the Loan Documents, following an Event of Default Lenders were entitled to declare the entire indebtedness immediately due and payable (Loan Agreement §8.2.1; Mortgage §10 [a] [i]). **[FN5]**

Because Lenders have made this prima facie showing, the burden then shifts to the Borrowers "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Borrowers fail to carry that burden here.

1. Executive Orders Concerning the Pandemic Do Not Bar Lenders' Motion

Initially, pandemic-related Executive Orders 202.8 and 202.28 (and their successors) do not bar Lenders' motion. Executive Order 202.8, which was issued on March 20, 2020, mandated "[t]here shall be no enforcement of . . . a foreclosure of any residential or commercial property for a period of ninety days" (EO 202.8). On May 7, 2020, the Governor issued Executive Order 202.28, which prohibited, until August 20, "initiation of a proceeding or enforcement of . . . a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage" (EO 202.28 at 2). That prohibition subsequently was extended, through intervening orders, to January 31, 2021 (EO 202.81).[FN6]

Borrowers contend that because Lenders filed this motion in May 2020, the motion violates Executive Order 202.8 and therefore "should be denied out of hand" (NYSCEF 257 at 9 [Borrowers' Opp. Br.]). But ruling on Lenders' entitlement to judgment does not contravene the EO's moratorium on foreclosure "enforcement." The latter refers to the sale of the subject collateral — an event that follows, and is distinct from, the award of judgment entitling the creditor to enforce the terms of the loan (*see, e.g.*, *Dumser v GSL Enters., Inc.*, 171 AD2d 583, 584 [1st Dept 1991] [granting summary judgment to plaintiffs in foreclosure action but also granting defendants' cross-motion to stay *enforcement* of the foreclosure judgment]).[FN7]

The State's directives about foreclosure matters track with that practical distinction, differentiating between "enforcement of . . . a foreclosure" and "foreclosure proceedings" more generally (*see* AO/68/20 [providing that "[a]ll residential foreclosure proceedings shall be suspended statewide until further notice"]). Because the Executive Orders do not stay the determination of this motion, the Court may proceed to the merits of Borrowers' defenses.

2. Borrowers' Defaults are Enforceable

Borrowers' main argument — that granting foreclosure as a matter of law is inappropriate because the admitted defaults are too technical or "inconsequential" to support such a remedy — is unavailing. To be sure, "in rare cases, agreements providing for the acceleration of the entire debt upon the default of the obligor may be circumscribed or denied enforcement by utilization of equitable principles" (*Fifty States Mgt. Corp. v Pioneer Auto Parks, Inc.*, 46 NY2d 573, 577 [1979]). But "[i]n the vast majority of instances," "[a]bsent

some element of fraud, exploitive overreaching or unconscionable conduct on the part of the [creditor] to exploit a technical breach, there is no warrant, either in law or equity, for a court to refuse enforcement of the agreement of the parties" (*id.* at 577; *see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380 [2005] ["caution[ing] generally against interfering with parties' agreements"]). Even if "provisions requiring strict compliance . . . turn[ ] out to be harsh," they "must be enforced" as "important, negotiated term[s] of the agreement" (*1029 Sixth, LLC v Riniv Corp.*, 9 AD3d 142, 149 [1st Dept 2004]; *see Key Intl. Mfg. Inc. v Stillman*, 103 AD2d 475, 477 [2d Dept 1984], *affd as mod*, 66 NY2d 924 [1985] ["h[olding] that the doctrine of insubstantial or de minimis default has no application in measuring performance of the terms of commercial paper"]; *see also Hyundai Capital Am. v Nemet Motors, LLC*, 19CV5506CBARER, 2019 WL 7598668, at *5 [ED NY Oct. 29, 2019], report and recommendation adopted, 19CV05506CBARER, 2019 WL 6337526 [ED NY Nov. 27, 2019] ["[T]he 'technical' nature of a default does not change the fact that Defendants defaulted under the Agreements . . . A default is a default is a default."]).

This is not one of those "rare cases" where equity will intervene to blunt the "contracted-for financial consequence of the [Borrowers'] own failure to do that which they promised to do" (*Riniv Corp.*, 9 AD3d at 150). There is no question that Borrowers defaulted under the terms of the Loan, multiple times (*see* Borrowers' Resp. to SUMF ¶¶33-35). Borrowers do not allege that Lenders engaged in "fraud, exploitive overreaching or unconscionable conduct." Nor does the record contain evidence of such grasping conduct. Indeed, Lenders twice agreed, in the Sixth and Seventh Amendments, to forbear from enforcing Borrowers' prior defaults (SUMF ¶¶23, 26-27). Borrowers also do not suggest that the defaults resulted somehow from mistake or inadvertent conduct. That weighs heavily against the application of equity; "[i]t would be a perversion of equitable principles to relieve a party of the impact of its intentional default" (*Fifty States Mgt. Corp.*, 46 NY2d at 577; *compare with, e.g.*, *In rem Tax Foreclosure Action No. 31, Borough of Manhattan*, 136 Misc 2d 522, 523-24 [Sup Ct, NY County 1987] [noting it "has the power to grant relief if the default is neither willful nor continuous, but is cured and the security restored unimpaired"]).

Borrowers' attempts to trivialize their serial defaults, in retrospect, ring hollow. As Lenders point out, the conditions in the Loan Agreement were not random or arbitrary; they guarded against risks to the collateral associated with financing the Project. Prompt, lien-free completion was important to Lenders, for example, because liens can bring down the value of Lenders' security, yet Borrowers' defaults may have saddled the Property with millions in

such liens (Zanolli Aff. ¶¶5, 19; *G-3 Purves St., LLC v Thomson Purves, LLC*, 101 AD3d 37 [2d Dept 2012] [rejecting defense that default was inconsequential and holding that tax lien "affected the value of the collateral securing the loan"]). Similarly, Lenders required Borrowers to secure a long-term retail tenant, reasonably concerned the leasehold's value could diminish without it. Whether or not Borrowers agree with Lenders' risk assessments is beside the point: they agreed to the terms of the Loan Agreement and its amendments thereto. Having obtained the benefits of those agreements — $650 million and, just as important, forbearance from two Events of Default — Borrowers' second-guessing the significance of their own breaches falls flat.

More broadly, Borrowers' arguments overstep the carefully drawn boundaries of a court's equitable powers. In Borrowers' expansive view, a court in equity may refuse to enforce a complex commercial agreement even in the absence of fraud, mistake, or bad faith if, in the court's own estimation, the breached provision is not sufficiently important. Such meddling flouts long-standing precedent (*e.g.*, *Fifty States Mgt. Corp.*, 46 NY2d at 577), and flips the burden on to the non-breaching party to prove that a default merits enforcement of contractual remedies. The parties here are sophisticated commercial actors who negotiated a Loan Agreement conditioned on Borrowers' ability, throughout the repayment period, to meet stringent benchmarks demonstrating the Project's financial viability.[FN8] To the extent Borrowers believe these requirements — not just their breaches, but the requirements themselves — are tangential to the parties' economic objectives (NYSCEF 257 at 13), that is an argument for the bargaining table. The Court's job is to apply the contract as written.

The authorities on which Borrowers rely, meanwhile, held off enforcement of mortgage defaults in the face of lingering fact disputes about the lenders' conduct or the existence of the underlying breaches. For example, a lender's long-delayed attempts at enforcement may raise issues of estoppel, waiver, or laches that warrant denial of summary judgment (*see Massachusetts Mut. Life Ins. Co. v Transgrow Realty Corp.*, 101 AD2d 771 [1st Dept 1984] [finding evidence supporting waiver or estoppel defense because "the purported breaches seem to have been long standing in nature" and plaintiff "allowed the lapse of a substantial period of time without attempting to enforce the mortgage"]; *BNH Caleb 14 LLC v Mabry*, 49 Misc 3d 402, 406 [Sup Ct, Queens County 2015] [denying summary judgment where mortgagor "had been lulled into a sense of belief that her tardy payment would be accepted"]). Or, the lender's actions may raise questions about its role in precipitating the borrower's default (*Metro. Nat. Bank v Adelphi Academy*, 2009 WL 1477998, at *4 [Sup Ct,

Kings County May 27, 2009] [questions of fact regarding "what, if any, negative impact [the lender] may have exerted on" the [*7]borrower's efforts to comply with loan terms]; *Canterbury Realty and Equip. Corp. v Poughkeepsie Sav. Bank*, 135 AD2d 102, 107 [3d Dept 1988] ["[A]n issue of fact was presented as to whether the Bank unfairly brought about the occurrence of the very condition precedent . . . upon which it relied to accelerate the loan against the guarantors."]).

And questions about whether the default even occurred, or whether it was inadvertent, may also forestall summary judgment (*see Fifty States Mgt. Corp.*, 46 NY2d at 577 [noting "equity may relieve against the effect of a good faith mistake, promptly cured by the party in default with no prejudice to the creditor"]; *Empbanque Capital Corp. v Geathers*, 224 AD2d 238, 239 [1st Dept 1996] [finding "defendant may have had a reasonable excuse for the default and a viable defense to the foreclosure"]; *Greenpoint Bank v Caraballo*, 2002 WL 34697748, at *8 [Sup Ct, NY County Oct. 7, 2002] [finding "legitimate dispute" existed about whether borrower defaulted]; *Wells Fargo Bank Minnesota, N.A. v Zobe, L.L.C.*, 2004 NY Slip Op 30344[U] [Sup Ct, Suffolk County 2004] [denying summary judgment due to "questions of fact pertaining to default and unconscionability"]; *In rem Tax Foreclosure Action No. 31, Borough of Manhattan*, 136 Misc 2d at 523-24 [denying summary judgment because mortgagor's "bookkeeping error . . . cannot be allowed to lead to the mortgagee's extreme remedy of foreclosure"]).

This case is different. Borrowers' defaults are conscious, ongoing, and undisputed. Borrowers do not allege that Lenders have engaged in conduct that would estop them from invoking their bargained-for remedies for the defaults, or that Lenders waited too long to enforce the terms of the Loan Agreements. And with one exception (the Reserve Account shortfall discussed at part I.A.3, *infra*), Borrowers do not allege that Lenders caused the defaults to occur. Therefore, the line of cases cited by Borrowers invoking equity to deny summary judgment on foreclosure claims is inapt.

3. The Reserve Account Shortfall Does Not Raise Fact Issues

Lenders' alleged actions in connection with the Reserve Account shortfall do not raise triable issues of fact. Recall that the Reserve Account was initially seeded with $75 million at inception, and the Loan Agreement required Borrowers to replenish the balance in the

Reserve Account to $30 million any time it fell below the $20 million Replenishment Trigger (Loan Agreement §3.14 [a]). In January 2020, the Reserve Account balance fell below the Replenishment Trigger by about $76,000, requiring Borrowers to make a replenishment deposit of $10,076,117.32 (Borrowers' Counterstatement of Material Facts ¶¶Z-AA [NYSCEF 258]; NYSCEF 181 at 8). When Borrowers failed to do so, Lenders declared another Event of Default; by then, Borrowers had already defaulted under several other provisions in the Loan Agreement, including the Final Completion and Retail Lease requirements (NYSCEF 181 at 7).

According to Borrowers, "the Reserve Account would not have fallen below the Replenishment Trigger in January 2020 had Lenders not paid their advisors more than $1.3 million dollars in unreasonable fees out of the Reserve Account prior to that time (and a total of more than $4.1 million to date)" (NYSCEF 257 at 15). As a result, Borrowers insist that "the Alleged Reserve Shortfall Default cannot be the basis for foreclosure" (*id.* at 16).

To begin with, even if the "the Alleged Reserve Shortfall Default cannot be the basis for foreclosure," as Borrowers contend, other valid bases for foreclosure still exist (Loan Agreement §8.2.1 [empowering Lenders to accelerate repayment "[u]pon the occurrence and during the continuation of an Event of Default"]).

But even when considered independently of the other defaults, the Reserve Account shortfall does not warrant denial of Lenders' motion. Of the $1.3 million in expenses cited by Borrowers, $700,000 were admittedly incurred after Borrowers had already triggered multiple Events of Default — and Lenders had already filed this action seeking to foreclose (*see* NYSCEF 257 at 15). Under the Loan Agreement, Borrowers expressly waived the right to challenge Lenders' post-EOD expenses (*see* Loan Agreement §3.11 ["[u]pon the occurrence and during the continuation of an Event of Default, Lender may apply any sums in any Cash Management Account in any order and in any manner as Lender shall elect in Lender's discretion . . . **without adversely affecting the rights of Lender to foreclose the Lien of the Security Instrument**"] [emphasis added]).[FN9] As for the remaining $600,000 in fees, Borrowers do not provide any evidence to suggest that these expenses were "unreasonable." Indeed, Siffin himself confirmed, in an email to Natixis dated July 2, 2019, that *he* requested Natixis transfer $629,967.17 from the reserve account to pay "various legal and underwriting fees and expenses" (NYSCEF 297; *see* Zanolli Reply Aff. ¶11 [NYSCEF 296]).

4. Borrowers are Not Entitled to Discovery under CPLR 3212[f]

Borrowers "failed to provide an evidentiary basis for concluding that discovery might lead to relevant evidence" (*Unisol, Inc. v Kidron*, 180 AD3d 570, 571 [1st Dept 2020]). Under CPLR 3212[f], the Court may deny a motion for summary judgment as premature "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated." But "summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]). "[A] grant of summary judgment is not premature merely because discovery has not been completed," and "[t]he mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*U.S. Bank N.A. v Wiener*, 171 AD3d 1241, 1242 [2d Dept 2019] [granting summary judgment in mortgage foreclosure action]; *Bernstein v Dubrovsky*, 169 AD3d 410, 410-11 [1st Dept 2019] [granting summary judgment dismissing defendant's affirmative defenses to foreclosure where "no discovery could lead to facts that would warrant the denial of" motion]).

Borrowers claim that discovery would aid in the pursuit of two different defenses — (i) that the defaults were "technical and immaterial" (NYSCEF 257 at 19), and (ii) that Lenders acted in "bad faith" by moving to foreclose on the Property in order to "pressure Siffin" in a Delaware bankruptcy proceeding (*id.* at 20).[FN10] Neither theory, however, promises to yield [*8]relevant evidence. Materiality is not a viable defense here, for the reasons stated above. And while allegations of "opportunistic bad faith" can provide grounds for denying foreclosure on summary judgment (*BNH Caleb 14 LLC v Mabry*, 49 Misc 3d 402, 404 [Sup Ct, Queens County 2015]), usually those allegations relate to the mortgagee's misconduct directly against the mortgagor (*see id.* at 406 [denying summary judgment where mortgagor "had been lulled into a sense of belief that her tardy payment would be accepted"]). Borrowers' circuitous theory of bad faith, on the other hand, speculates that foreclosure may be inappropriate because one of the 11 Lenders here (Natixis) is seeking to gain leverage over Siffin in an unrelated case involving an unrelated debtor. Borrowers fail to explain how Natixis's actions amount to misconduct, or why it would entitle them to probe Lenders' motives for exercising bargained-for contract remedies here (*Dickerman v Northern Trust Co.*, 176 US 181, 190 [1900] ["[I]f the debt secured by a mortgage be justly due, it is no

defense to a foreclosure that the mortgagee was animated by hostility or other bad motive"]; *Big Apple Car v City of New York*, 204 AD2d 109 [1st Dept 1994] [party may exercise contractual right "without court inquiry into whether the termination was activated by an ulterior motive"]).

5. *Borrowers' Counterclaims are Dismissed*

Last, Borrowers' counterclaims do not raise genuine issues of material fact. They duplicate the materiality and bad-faith defenses rejected above (NYSCEF 257 at 21 ["Borrowers have alleged valid and justiciable counterclaims that seek the same relief that Borrowers advance through their defenses to Lenders' claims"]) and, in any event, have been waived under the terms of the Loan Agreement (*see* Loan Agreement §10.15 [providing that Borrowers "waive the right to assert a counterclaim, other than a compulsory counterclaim, in any action or proceeding brought against [them] by Lender"]; *Greater NY Sav. Bank v 2120 Realty Inc.*, 202 AD2d 248, 248 [1st Dept 1994] [affirming dismissal of borrower's counterclaims and awarding summary judgment to foreclosing lender "since the right to assert such [counter]claims was waived pursuant to the 1988 note"]).

* * * *

Therefore, the branch of Plaintiffs' motion seeking summary judgment against the Borrowers and Guarantor is **GRANTED**.

B. Summary Judgment against the Mechanic's Lienors

Turning to the mechanic's lienors, the main question is whether, as a matter of law, the Lenders' mortgage lien is superior to the subsequently-filed mechanic's liens. The dispute is definitional. Recorded mortgages generally have priority over subsequently-filed mechanic's liens (Lien Law §13.1). But if a mortgage qualifies as a "building loan mortgage" (BLM), made pursuant to a "building loan contract" (BLC), then the mortgage is superior *only if* it is filed in accordance with Lien Law §22. If a mortgage constitutes a BLM, and is not filed in accordance with Section 22, then subsequently-filed mechanic's liens take priority over the mortgage lien. Here, Lenders did not file the mortgage in accordance with Section 22. So, if

the mortgage is a BLM, the mortgage is subordinate to the subsequently-filed mechanic's liens; if it is not, the mortgage remains superior.

"A classic building loan mortgage is characterized, inter alia, by (1) a requirement in the [*9]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, and is subject to the subordination provisions of Lien Law § 22" (*Dienst v Paik Const., Inc.*, 139 AD3d 607, 607-08 [1st Dept 2016]; *Pawling Sav. Bank v Jeff Hunt Props., Inc.*, 225 AD2d 678, 679 [2d Dept 1996] [describing building loan mortgage as "one to provide 'a loan for the purpose of erecting a building and to be advanced in installments from time to time as might be rendered safe by the condition of the building'"]; *see* Lien Law §2 [13] [defining BLC 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 . . ."] [emphasis added]).

These guidelines serve important policy goals. "[T]he language at issue had its genesis in the economic malaise that prevailed at the end of the 1920's and into the early 1930's," when "[t]he unusually heavy losses which 'materialmen, supplymen and laborers' then suffered motivated the Legislature to take action which was thought likely to eradicate its root causes" (*Nanuet Nat. Bank v Eckerson Terrace, Inc.*, 47 NY2d 243, 247 [1979]). Lien Law §22, therefore, is designed to "readily enable a contractor to learn exactly what sum the loan in fact made available to the owner of the real estate for the project" (*id.*; *see P.T. McDermott, Inc., v Lawyers' Mtge. Co.*, 232 NY 336, 341-42 [1922] ["object is to acquaint prospective contractors with the fact that they furnish labor and materials subject to claims prior to theirs against the property . . . and also to inform such contractors of the amounts to be advanced and the times of such advances"]; *Howard Sav. Bank v Lefcon Partnership*, 209 AD2d 473, 475 [2d Dept 1994] ["The underlying purpose of Lien Law §22 is to permit contractors and subcontractors to ascertain how much money will be made available to the owner in connection with the project and thus, the ability of the owner to pay for any services and materials provided."]). Consistent with its remedial aims, the Lien Law "mandate[s] that its provisions 'be construed liberally to secure (their) beneficial interests and purposes'" (*Nanuet Nat. Bank*, 47 NY2d at 249).

Based on the undisputed factual record, the Loan Agreement does not constitute a BLC, which means the mortgage is not a BLM. The nature of the Loan Agreement must be discerned through its governing documents (*Amsterdam Sav. Bank v Terra Domus Corp.*, 97 AD2d 41, 44 [3d Dept 1983] ["A review of the documents related to this transaction . . . reveals that there was no express promise by Terra Domus to improve property, a promise which is required for there to be a 'building loan contract.'"]; *Finest Invs. v Sec. Trust Co. of Rochester*, 96 AD2d 227, 229 [4th Dept 1983], *affd* 61 NY2d 897 [1984] [not BLM where "[t]he agreement filed with Finest Investments' mortgage did not require the mortgagor to construct any building or improvement and the loan was not to be advanced in installments, but in one lump sum"]; *see also In re 455 CPW Assoc.*, 192 BR 85, 88-89 [Bankr SD NY 1996], *affd* 42 Collier Bankr Cas 2d 1133 [SD NY Aug. 31, 1999], *affd* 225 F3d 645 [2d Cir 2000] ["[F]or a mortgage to be construed as a building loan contract, requiring filing under section 22, there must be an express contract to improve property. . . . [and] under New York case law, that express promise must be contained in the governing loan documents."]; *compare with Altshuler Shaham Provident Funds, Ltd. v GML Tower, LLC*, 21 NY3d 352, 363 [2013] ["The 2007 loan agreement is a building loan contract as defined under section 2(13) of the Lien Law: the agreement called for transfer of $4.5 of the $10 million deposited by Altshuler into the trust account to a dedicated bank account of [*10]GML Tower/Ameris (the restricted account), to be "released if, when and as required to finance and pay [for] the construction of" the improvements to the tower building, "subject to the terms and conditions of" the construction plans, and these loan proceeds were to be secured by a mortgage."]).

The Loan Agreement, by its terms, does not meet the conditions for a BLC under the Lien Law. Section 2.1 of the Loan Agreement provides that "[t]he Loan is fully funded and no portion of the proceeds thereof shall be used for the Work." The Construction Reserve Agreement contains a covenant to complete improvements, but clearly states that the reserve established to fund completion of the improvements was *not* to contain Loan proceeds (*see* Construction Reserve Agreement §2.2.2 ["**[T]he Construction Reserve Funds are not proceeds of the Loan and shall not be used for payment or repayment of all or any portion of the Loan** and shall be used solely for the costs to achieve Final Completion of the Project Improvements in accordance with the Plans, subject to changes thereto permitted hereunder or under the Development Agreement, with the balance to be distributed in accordance with the terms of the Development Agreement."] [emphasis added]; *id.* §6.1 [noting that the $138-million reserve amount "shall not constitute Loan funds"]).

That the Loan Agreement was part of a larger transaction, in which the Borrowers promised to make improvements to the property, does not raise a genuine issue of fact. The mechanic's lienors do not identify an "express promise" in the Loan Agreement to *use the loan proceeds* to fund those improvements. Indeed, as noted, the Loan Agreement contained express promises to not use the loan proceeds in that manner.

Lehman Bros. Holdings v Broad, LLC, 2011 NY Slip Op 31931[U] [Sup Ct, NY County 2011], is instructive. There, the Court held that a mortgage was not a BLM despite a provision in the loan agreement that would hold the borrower in default if it failed to complete the construction work and a simultaneously executed guaranty in which the guarantor covenanted to complete the construction work. The court found that the loan agreement provided payment in one lump sum, and "did not advance any funds for the purpose of making improvements to the property" (*id.*). Further, "there [was] no evidence of any express promise (or of a continuing promise) in the Senior Mortgage, made by the owner to improve the real property" (*id.*). And "the fact that [the borrower] would be in default under the Senior Mortgage if it defaulted under the Building Loan Agreement does not suggest that [the borrower] had an express promise to make improvements" (*id.*).

The same rationale applies here. While the parties undoubtedly contemplated that improvements to the Property would take place, the funds were not loaned in a manner recognized by the law as constituting a BLM. Rather, the construction-related benchmarks in the transaction served to gauge the ongoing financial viability of the Project, which allowed Lenders to monitor their prospects of getting repaid.[FN11]

Therefore, the branch of Plaintiffs' motion seeking summary judgment against the mechanic's lienors is **GRANTED**.

C. Severance of Third-Party Claims and Cross-Claims

Next, Lenders seek to sever and consolidate the mechanic's lienor Defendants' third-party claims and cross-claims against each other, the fee owner, and any general contractors (*see* [*11]CPLR §603 ["[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue"]).

Where, as here, such claims do not contest the validity of the mortgage or the Lender's right to foreclose, "the appropriate remedy is to sever [them] from the foreclosure action" (*First Union Mortg. Corp. v Fern*, 298 AD2d 490, 491 [2d Dept 2002] [severing counterclaim that "does not affect the validity of the mortgage"]; *Garrison Commercial Funding IV REO LLC v NMP-Grp. LLC*, 30 Misc 3d 1227(A) [Sup Ct, NY County 2011] [severing mechanic's lienor defendant's third-party claims as "unrelated to the validity of [plaintiff's] Mortgage on the Property"]).

Therefore, this branch of the Lenders' motion is **GRANTED**.

D. Default Judgment and Discontinuance

Finally, Lenders seek orders of default and discontinuance against several mechanic's lienors. Lenders seek entry of default judgment against Defendants Service Glass & Store Front Co. Inc., Signature Metal & Marble LLC, Façade Maintenance Systems LLC, and AF Supply Corporation (the "Defaulting Defendants")[FN12] pursuant to CPLR 3215 and RPAPL §1321 for failing to appear or plead with respect to the Complaint (NYSCEF 181 at 23). The Defaulting Defendants were each served with the amended Complaint on February 20, 2020, via the New York Secretary of State (Affirmation of Regularity of Steven Sinatra ["Sinatra Aff."] ¶23 [NYSCEF 183]). They have not responded to the amended Complaint, and their time to do so has expired (*id.* ¶¶23-24). Nor have they opposed Lenders' motion. Therefore, this branch of the motion is **GRANTED**.

Further, Lenders request that the Court discontinue this action as against Defendants Metal Sales Co. Inc. ("Metal Sales"), Buro Happold Consulting Engineers, Kings County Waterproofing Corp. and Cord Contracting Co. Inc. (NYSCEF 181). The request is granted as to Buro Happold Consulting Engineers, Kings County Waterproofing Corp. and Cord Contracting Co. Inc. (the "Discontinued Defendants"), who have not been served, and have not appeared, in this action (Sinatra Aff. ¶21).

But the request for discontinuance is denied as to Metal Sales, out of concern for the potential prejudice such discontinuance may have on Metal Sales's ability to enforce its lien (*see* CPLR 3217 [b] ["[A]n action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper."]; *Burnham Serv. Corp. v Natl. Council on Compensation Ins., Inc.*, 288 AD2d 31, 32 [1st Dept 2001] [noting that determination of motion for voluntary discontinuance is "generally within

the sound discretion of the court"]; *Haughey v Kindschuh*, 176 AD3d 785, 786 [2d Dept 2019] ["Factors militating against discontinuance include prejudice to an opposing party."]). Metal Sales was served in this action, and has served an Answer to the Amended Complaint, in which it asserted a cross-claim to foreclose its own mechanic's lien (NYSCEF 238). According to Metal Sales, it chose to proceed by cross-claim here — rather than commencing its own action — in reliance on Lenders' initial inclusion of Metal Sales in the case (NYSCEF 254 at 4). Since the time for Metal Sales to commence its own action on the lien may have expired, it fears that discontinuance now would [*12]leave the company without a way to enforce the lien. Whatever the merits of the claim may be, allowing Metal Sales to remain in the action, as severed from Lenders' foreclosure action (*see* Part I.A.C, *supra*), minimizes the risk of prejudice against any party.

Therefore, this branch of Lenders' motion is **GRANTED IN PART**, and the names of the Discontinued Defendants, along with the John Doe Defendants, shall be deleted from the case caption.

TSQ DEFENDANTS' MOTION TO DISMISS COUNTS IV & V OF TEXAS SCENIC'S CROSS-CLAIMS

A. Background

Texas Scenic, a theatrical stage design company, was a subcontractor on the Project tasked with furnishing and installing the theatrical rigging and hardware for a cabaret stage in the building (NYSCEF 241 ¶46 [Am. Answer with Cross-Claims]). The company entered into a subcontract with CNY Construction 701 LLC ("CNY"), the general contractor on the Project, in March 2018 (*id.*). Over the next eleven months, Texas Scenic alleges that it completed all work, labor, and services required under the agreement and change orders (*id.* ¶¶50, 54). CNY has paid Texas Scenic only a portion of the agreed-on price, however, leaving approximately one hundred thousand dollars "due owing from CNY to Texas Scenic" (*id.* ¶53). On May 16, 2019, Texas Scenic filed a mechanic's lien against the Property in that amount (*id.* ¶55).

Based on these allegations, Texas Scenic has asserted claims in this action to foreclose on the mechanic's lien (Count I) and claims for damages against CNY (Counts II and III). In addition, and as relevant here, Texas Scenic also asserted two cross-claims directly against TSQ Lessee and TSQ GroundCo LLC (the "TSQ Defendants") — for unjust enrichment

(Count IV) and breach of contract (Count V). The TSQ Defendants now move to dismiss those two cross-claims. The motion is granted.

B. Discussion

On a motion to dismiss under CPLR 3211(a)(7), the Court must determine whether, accepting as true the facts alleged in the complaint, the plaintiff has a legally cognizable cause of action (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]). While it is generally true that a court addressing such a motion is required to accept as true the allegations in a complaint, "conclusory allegations — claims consisting of bare legal conclusions with no factual specificity — are insufficient to survive a motion to dismiss" (*Barnes v Hodge*, 118 AD3d 633, 633 [1st Dept 2014]; *see also Franklin v Winard*, 199 AD2d 220, 220 [1st Dept 1993]; *Mark Hampton, Inc. v Bergreen*, 173 AD2d 220 [1st Dept 1991]).

Texas Scenic fails to allege sufficient facts to support its fourth and fifth cross-claims against the TSQ Defendants. On the unjust enrichment claim, the existence of an express agreement between Texas Scenic and CNY precludes recovery against TSQ GroundCo based on quasi-contract claims (*see Basis Yield Alpha Fund (Master) v Goldman Sachs Grp., Inc.*, 115 AD3d 128, 141 [1st Dept 2014]). By its own allegations, Texas Scenic performed work under a subcontract with CNY, and is in fact already seeking to recover under that contract in this case (Cross-Claims ¶¶ 69-78). While Texas Scenic suggests in its brief that it had some direct dealings with TSQ GroundCo, there are no factual allegations in Texas Scenic's pleadings to support this theory.

The fifth cross-claim for breach of contract, against TSQ Lessee, fares no better. Texas Scenic fails to allege the basic elements of a breach of contract claim. The threadbare allegations consist of a single paragraph in the Cross-Claims, stating that "TSQ Lessee [*13]guaranteed payment" (Cross-Claims ¶91). That is insufficient, even at the pleading stage, to support a contract claim (*TW Installations LLC v WC28 Realty LLC*, 2017 NY Slip Op. 32226[U], 10 [Sup Ct, New York County 2017] [dismissing claims because "[w]hile pleadings are to be given a liberal construction, a complaint must be sufficiently particular to give the court and the parties notice of the material elements of a cause of action"], citing *Woolridge v Rosen*, 35 AD2d 714 [1st Dept 1970]).

Texas Scenic fails to allege: (i) the terms of any *specific* agreement, written or otherwise, established between the parties; (ii) that it performed pursuant to any purported contract; (iii) that TSQ Lessee had obligations to perform under any purported contract, let alone that it failed to perform any of those obligations; or (iv) any damages that resulted from any alleged failure to perform (*see The John Galt Corp. v Travelers Cas. and Sur. Co. of Am.*, 2009 NY Slip Op 30969[U] [Sup Ct, NY County 2009] ["A basic principle of contract law is that, '[w]ithout an agreement, there can be no contract and . . . without a contract there can be no breach."], quoting *Kleinschmidt Div. of SCM Corp. v Futuronics Corp.*, 41 NY2d 972, 973 [1977]).

Therefore, the TSQ Defendants' motion is **GRANTED WITH PREJUDICE**. Texas Scenic has already amended its cross-claims once, on June 5, 2020 (NYSCEF 241), and does not provide a basis for further amendment at this time.

II. *LIVINGSTON ELECTRICAL ASSOCIATES, INC.'S MOTION FOR LEAVE TO INTERVENE*

Livingston Electrical Associates, Inc. ("Livingston") is another subcontractor who allegedly performed work on the Project and, later, filed a mechanic's lien against the Property in order to secure full payment for its work (*see* NYSCEF 345 [Livingston's notice of mechanic's lien]). Livingston moves to intervene as a party defendant in this action, seeking foreclosure of its mechanic's lien and to assert various cross-claims against CNY (*see* NYSCEF 349 [Livingston's proposed verified answer with cross-claims]).

Lenders are alone in opposing Livingston's motion, noting that "[i]nsofar as the claims Livingston proposes to assert are indistinguishable in nature from the third-party claims that are subject to [Lenders'] motion to sever, Livingston's claims similarly have no legitimate place in this action" (NYSCEF 361 at 3). The Court agrees.

Because the Court is granting Lenders' request to sever third-party claims and cross-claims (*see* Part I.C., *supra*), Livingston may not intervene in *this* action but remains free to intervene in the severed action. Therefore, Livingston's motion is **DENIED**, without prejudice to Livingston seeking to intervene in the severed action.

* * *

Accordingly, it is

ORDERED that Plaintiffs' motion for summary judgment (Motion Sequence No. 002) is granted in part, such that it is:

(i) **ORDERED** that the branch of Plaintiffs' motion that seeks summary judgment in Plaintiffs' favor on all of the relief requested in their Amended Complaint, including judgment of foreclosure and sale, is **GRANTED**; it is further

(ii) **ORDERED** that the branch of Plaintiffs' motion seeking summary judgment dismissing the counterclaims is **GRANTED**; it is further

(iii) **ORDERED** that the third-party claims and cross-claims are **SEVERED** from the main action and continued, and the Clerk of the Court shall mark the records to reflect the severance; it is further

(iv) **ORDERED** that Plaintiffs are **granted judgment** against defendants Service Glass & Store Front Co. Inc., Signature Metal & Marble LLC, Façade Maintenance Systems LLC, and AF Supply Corporation for all the relief requested in the Complaint, including judgment of foreclosure and sale, as a matter of law, on the ground that these defendants have failed to appear, plead or move in response to the Complaint within the time required; and it is further

(v) **ORDERED** that the Clerk of the Court is **directed to amend the caption** of this proceeding by deleting the names of the "John Doe" defendants, Buro Happold Consulting Engineers, Kings County Waterproofing Corp. and Cord Contracting Co. Inc.; it is further

ORDERED that the TSQ Defendants' motion to dismiss Counts IV and V of Texas Scenic's cross-claims (Motion Sequence No. 003) is **GRANTED** with prejudice; it is further

ORDERED that Livingston's motion to intervene (Motion Sequence No. 005) is DENIED; and it is further

ORDERED that all parties (both in the main action and the severed action) appear for a status conference to discuss next steps on **March 23, 2021 at 10 a.m.**

This constitutes the Decision and Order of the Court.

DATE 3/4/2021

JOEL M. COHEN, J.S.C.

Footnotes

Footnote 1: Plaintiffs comprise 11 lenders holding notes that, together, reflect the $650 million loan amount: Natixis, New York Branch ("Natixis"); Cathay Life Insurance Co., Ltd.; Nonghyup Bank; Nonghyup Bank New York Branch; Nonghyup Bank in its capacity as trustee for and on behalf of AIP USRED Private Real Estate Trust No. 10; Nonghyup Bank in its capacity as trustee for IGIS Global Private Placement Real Estate Fund No. 198; KEB Hana Bank New York Agency; Harel — 20 Times Square — General Partnership; Chang Hwa Commercial Bank, Ltd., Los Angeles Branch; China Merchants Bank Co., Ltd., New York Branch; and Violet Protected Asset SPC.

Footnote 2: Unless otherwise noted, these facts are undisputed.

Footnote 3: Borrowers dispute the accuracy of the Current Deficiency Deposit, but do not dispute that they failed to pay any part of it (Borrowers' Resp. to SUMF ¶¶21-22).

Footnote 4:*Available at* https://www.nycourts.gov/whatsnew/pdf/AO-157-20.pdf.

Footnote 5: Lenders have also made a prima facie case against Guarantor (SUMF ¶¶5, 13, 38-43). Although Guarantor "joins in [Borrowers'] opposition" (NYSCEF 257 at 1 n.1), he does not raise any arguments or defenses specific to his obligations under the Guaranty.

Footnote 6: The added prohibition against "initiation of . . . a foreclosure" does not apply here because Lenders commenced this action in December 2019 (NYSCEF 1-2).

Footnote 7: Plaintiffs' counsel noted at oral argument that "[w]e are not facing a foreclosure sale any time in the near future" because, even prevailing on this branch of their motion, Plaintiffs seek a "referee's proceeding in order to ascertain and compute the indebtedness" (Nov. 18, 2020 Oral Arg. Tr. at 37:4-9; *see* Pls.' Notice of Motion at 3 [seeking to refer this action to referee] [NYSCEF 180]). As ordered below, the Court will convene a status conference with the parties to discuss this and other next steps.

Footnote 8: To be clear, principles of equity can apply to sophisticated parties — when they

appear to be victims of "fraud, exploitive overreaching or unconscionable conduct." But the important point here is that Borrowers, as sophisticated entities negotiating a bespoke, multimillion-dollar debt arrangement, cannot plausibly claim they were hoodwinked by Lenders about the strict conditions — and drastic remedies — underlying the Loan Agreement.

Footnote 9: In addition, Guarantor cannot raise any of the Lenders' expenditures (whether before or after default) as a defense to liability under the Guaranty. In Section 5(b)(ii) of the Guaranty, Guarantor agreed that his obligations "shall not be in any way affected by . . . any failure by Lender . . . to perform or comply with any of the terms of the Loan Agreement, or any other Loan."

Footnote 10: This defense concerns Natixis primarily. Siffin "believe[s] that Natixis is likely pursuing this action, and in particular the remedies of acceleration and foreclosure, in large part to apply pressure to [him]" in an ongoing bankruptcy proceeding in Delaware (Siffin Aff. ¶53). Natixis is apparently "a major lender" to the bankruptcy debtor there, which Siffin indirectly owns (*id.*). But Siffin acknowledges that the bankruptcy debtor is "unrelated" to the Project at issue here (*id.*).

Footnote 11: The Court has considered the mechanic's lienors other' arguments and finds them unavailing.

Footnote 12: By stipulation, Lenders withdrew their request to seek entry of default judgment against Façade Technology, LLC (NYSCEF 302), Texas Scenic Company Inc. (*id.*), and Penguin Maintenance & Services, Inc. (NYSCEF 328).

Return to Decision List