At Commercial Division Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of January, 2012.

P R E S E N T:
HON. CAROLYN E. DEMAREST,

Justice.

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BANCO POPULAR NORTH AMERICA,

Plaintiff,

- against -

333-345 GREEN LLC, et al.

Defendant.

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DECISION AND ORDER

Index No. 6781/10

The following papers numbered 1 to 12 read on this motion: Papers Numbered

Notice of Motion/Order to Show Cause/Petition/ Cross Motion and Affidavits(Affirmations)Annexed	1-3
Opposing Affidavits (Affirmations)	7-9
Reply Affidavits(Affirmations)	11
Other Papers (Rule 19-A Statement) (Memoranda of Law) (Summons and Verified Complaint)	4 5,10,12 6

Plaintiff moves pursuant to CPLR 3212 for an order directing entry of summary judgment against defendants 333-345 Green LLC, Martin Daskal, Joseph Tyrnauer, WTC Construction Co. Inc, and Daley Construction of America LLC on plaintiff's first, second and third causes of action, striking those defendants' affirmative defenses, judgment for plaintiff as to Daley Construction of America LLC's first cause of action, the dismissal or severance of any cross-claims and counterclaims, an order directing entry of default judgment pursuant to CPLR 3215 as to the remaining defendants, and for an order of reference pursuant to Real Property Actions and Proceedings Law 1321.

BACKGROUND

This is a commercial mortgage foreclosure action with respect to real property located at 333 Green Avenue, Brooklyn, New York known as Block 1953, Lot 49 ("Property"). On

June 30, 2006, Defendant 333-345 Green LLC ("Green") executed and delivered a building loan agreement ("Building Loan Agreement"), a project loan agreement ("Project Loan Agreement"), collectively referred to as the "Agreements", three notes, and three corresponding mortgages on the Property to the plaintiff with respect to the construction of a residential condominium building with commercial space ("Project") on the Property. The three notes were identified as a "Building Loan Note", a "Project Loan Note", and an "Acquisition Loan Note" (collectively referred to as the "Notes"). The three corresponding mortgages were identified as a "Building Loan Mortgage", a "Project Loan Mortgage", and an "Acquisition Loan Mortgage" (collectively referred to as the "Mortgages").[1] On June 26, 2006 defendants Joseph Tyrnauer ("Tyrnauer"), Martin Daskal ("Daskal"), and WTC Construction Co., Inc. ("WTC") (together with Green, are collectively referred to as the "Green Defendants"), executed a payment guaranty agreement, guarantying the payment obligations of Green to plaintiff under the Notes and Mortgages, and a completion guaranty agreement, guarantying the performance obligations of Green to plaintiff ("Guarantys"). The Notes, Mortgages, Guarantys, and Agreements were all amended and restated on February 11, 2009.[2] The maturity date on the Notes was September 30, 2009. Plaintiff recorded a UCC-1 financing statement from Green in favor of plaintiff on July 12, 2006. The remaining defendants have liens against the Property that were recorded after the Mortgages.

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[1] The Project Loan Mortgage and Building Loan Mortgage were amended and restated in 2009 and the Acquisition Loan Mortgage was the result of the consolidation of a number of individual mortgages and notes and was also amended and restated in 2009. However, to the extent that they are not otherwise provided in the decision, the court need not address the details of the history of the Notes and Mortgages as the defendants at issue do not contest that they entered into the Notes and Mortgages or which Notes and Mortgages are at issue. The history of the formation of the notes and mortgages is recited in further detail in the plaintiff's Rule 19-A Statement which was submitted in support of the present motion.

[2] Unless otherwise indicated, all references to Notes, Mortgages, Guarantys, and Agreements in this decision refer to the documents as restated or reaffirmed on February 11, 2009.

Plaintiff alleges that Green breached the terms of the Notes by failing to pay the principal and interest due to plaintiff on the maturity date, September 30, 2009. Consequently, plaintiff, by a Notice of Default letter dated December 23, 2009 ("Notice of Default"), notified Steven A. Weg and Michael T. Rogers, the attorneys for the Green Defendants at the time, that although plaintiff attempted to reach a resolution, the lack of cooperation by the Green Defendants prevented the entering of a loan modification. Accordingly, the Notice of Default declared the amount due under the notes to be $18,411,779.62. Plaintiff commenced this foreclosure action and filed a notice of pendency on March 17, 2010.

Plaintiff moves for default judgment pursuant to CPLR 3215 against Moseson & Associates Corp., Builders Assistance Corp., RE Hanson Industries Inc., Tri-State Lumber Inc., Tri-State Brick & Stone of New York Inc., Samuel Feldman Lumber Co. Inc. ("Feldman"), R. Klich Window & Door System, Inc., Falco Electrical Services, Inc., Supreme Flooring, Pucuda In./Leading Edge Safety Systems, the City of New York, the New York State Department of Taxation and Finance, and the New York City Environmental Control Board. The only opposition, with respect to the defaulting parties, was submitted by Feldman who submitted a notice of appearance and a claim and demand for surplus monies, pursuant to RPAPL 1361, based upon its two mechanic's liens filed against the Property. At oral argument, plaintiff withdrew the default motion as to Feldman.

Plaintiff moves for summary judgment and an order of reference against the Green Defendants. Plaintiff argues that it has established it is the holder of the Notes and Mortgages on the Property and that the Green Defendants have not made payments in accordance with the Notes. Further, plaintiff argues that the Green Defendants' affirmative defenses and counterclaims are boiler plate, conclusory, and baseless.

In opposition to the motion, Daskal and 333-345 Green LLC[3] ("Daskal Defendants")

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[3] It is noted that Daskal and Tyrnauer are each 50% owners of Green and both purport to represent Green. The ownership interests and management of Green, the construction on the

argue that the motion is premature as discovery is yet to be completed. However, the Daskal Defendants do not include an affidavit from a person with knowledge in opposition to the motion. The Daskal Defendants only provide a copy of a verified complaint[4] brought by the Daskal Defendants in which they seek compensatory damages and the voiding of the loans at issue due to Banco Popular's purported fraud in improperly distributing funds for the Project. The Daskal Defendants do not address what discovery they are seeking other than the inclusion of their first set of interrogatories which was served upon the plaintiff on the same date as the opposition to the current motion. It is noted that the Daskal Defendants do not deny signing the Notes, Mortgages, Guarantys or deny the allegations that they defaulted. Further, the Daskal Defendants do not identify a provision in any of the Notes or Mortgages that the plaintiff purportedly breached by releasing funds.

In opposition to the motion, Tyrnauer, WTC Construction Co., Inc., and 333-345 Green LLC ("Tyrnauer Defendants") argue that, pursuant to the Notes and Mortgages, no event of default occurred because the Notice of Default was not sent to the law firm listed in the Mortgages, plaintiff has failed to address the Tyrnauer Defendants' affirmative defenses and counterclaims, and summary judgment is premature as more discovery is necessary. The Tyrnauer Defendants argue that the plaintiff failed to fund the Project "when required" and that "events outside the control of any of the parties" prevented Green from performing under the loan. It is noted that the Tyrnauer Defendants do not deny signing the Notes, Mortgages, Guarantys or deny the allegations that the Tyrnauer Defendants' failed to

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Property, and other issues between Daskal and Tyrnauer, including this Property and other properties, are the subject of numerous actions presently pending before this court (*see Tyrnauer v Daskal*, Index No. 28384/09; *Daskal v Tyrnauer*, 31074/09; *Tyrnauer v Daskal*, Index No. 9986/10; *Signature Bank v 1775 East 17th Street*, Index No. 12299/10; *In the Matter of Tyrnauer*, Index No. 26129/10; *Daskal v Tyrnauer*, Index No. 500734/11; *Daskal v Tyrnauer*, Index No. 500735/11).

[4] *Daskal v Banco Popular North America*, Index No. 4230/11. A request for judicial intervention, along with a motion to consolidate that action with the present action, was filed on January 5, 2012, three months after the oral arguments on the present motion.

pay plaintiff before the maturity date. Further, the Tyrnauer Defendants do not identify a specific time period, in any document, by which the plaintiff was required to release funds or deny that they had actual knowledge of the Notice of Default.

DISCUSSION

In support of its motion, plaintiff has submitted the complaint which includes the Notes, Mortgages, Guarantys, the Notice of Default, and other relevant documents regarding the consolidation of the Notes and Mortgages. The complaint is verified by Gregory Miedrzynski, Vice President of Commercial Real Estate/Construction Finance for plaintiff. In the complaint, Mr. Miedrzynski attests that Green defaulted under the Notes and Mortgages on September 30, 2009 and plaintiff demanded an outstanding balance of $17,335,209.50, along with interest and other charges, in the Notice of Default on December 23, 2009.

By presenting the Mortgages and unpaid Notes, along with evidence of Green's default, plaintiff has established its prima facie entitlement to judgment as a matter of law (*see Washington Mut. Bank, F.A. v O'Connor*, 63 AD3d 832, 833 [2009]; *Daniel Perla Assoc., LP v 101 Kent Assoc., Inc.*, 40 AD3d 677, 677 [2007]; *US Bank Trust N.A. Trustee v Butti*, 16 AD3d 408, 408 [2005]; *Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 482 [2003]; *Hypo Holdings v Chalasani*, 280 AD2d 386, 387 [2001]; *Marine Midland Bank v Micheli Contr. Corp.*, 95 AD2d 946, 947 [1983]). Thus, the burden shifts to defendants to produce evidentiary proof, in admissible form, sufficient to raise a triable issue of fact as to their defenses (*see Washington Mut. Bank, F.A.*, 63 AD3d at 833; *US Bank Trust N.A. Trustee*,16 AD3d at 408).

Defendants, in response to plaintiff's prima facie showing of its entitlement to a judgment of foreclosure as a matter of law, have failed to demonstrate any triable issue of fact as to any defense or counterclaim in this foreclosure action (*see Washington Mut. Bank, F.A.*, 63 AD3d at 833; *Daniel Perla Assoc., LP*, 40 AD3d at 678; *US Bank Trust N.A. Trustee*, 16 AD3d at 408; *Republic Natl. Bank of N.Y.*, 308 AD2d at 482; *Federal Home*

Loan Mtge. Corp. v Karastathis, 237 AD2d 558, 558 [1997]).

The Daskal Defendants' opposition, which does not contain an original affidavit in opposition, does not deny entering into the Notes and Mortgages or deny that Green is in default by the terms of the Note. Further, the Daskal Defendants' answer contains merely general denials, which are insufficient to raise a triable issue of fact and defeat plaintiff's motion for summary judgment (*see Matter of Gruen v Deyo*, 218 AD2d 865, 866 [1995]; *Stern v Stern*, 87 AD2d 887, 887 [1982]).

The Daskal Defendants' first affirmative defense of unclean hands is stricken as this pro-forma defense is conclusory in nature and the Daskal Defendants have failed to provide any specific factual allegations whatsoever in support of the defense.

The Daskal Defendants' second affirmative defense asserts that plaintiff failed to mitigate their damages. Such defense is wholly devoid of merit as plaintiff timely notified defendants of Green's default. Therefore, the striking of this defense is warranted.

The Daskal Defendants' third affirmative defense alleges that the claims asserted by plaintiff are barred in whole or in part by the express and/or implied terms of the various agreements among plaintiff, Green, WTC, Tyrnauer, and Daskal. This defense lacks any specific factual allegations to support it, and the Daskal Defendants do not pursue this defense in its opposition papers. Consequently, this defense must be stricken.

The Daskal Defendants' fourth affirmative defense alleges that the claims are barred in whole or in part because the alleged damages sustained by plaintiff were the result of the wrongful conduct and negligence of Tyrnauer, as set forth in Daskal's complaint in the action entitled *Daskal v Tyrnauer* (Sup Ct, Kings County, index No. 31074/09). The claims in this other action, however, deal with the internal strife between Daskal and Tyrnauer and do not relate to Green's undisputed default. The Daskal Defendants claim that the default was the result of Tyrnauer's conduct in diverting funds from the Project. Thus, the Daskal Defendants' allegations regarding Tyrnauer do not affect plaintiff's right to foreclose and fail to provide a defense to this foreclosure action. Consequently, the striking of this defense is

mandated.

The Daskal Defendants' fifth affirmative defense asserts that any damages allegedly sustained by plaintiff were caused, in whole or in part, by the culpable conduct, carelessness, recklessness, negligence, or wrongdoing of plaintiff, its agents, and others for whom it was responsible. However, the Daskal Defendants fail to specifically plead the acts or conduct that plaintiff allegedly engaged in which, it is claimed, caused its own damages. Consequently, this defense must be stricken.

The Daskal Defendants attempt to incorporate the verified pleadings in the *Daskal v Banco Popular* (Index no. 4230/11) action ("Daskal Action") in support of its opposition to the present motion. The complaint in the Daskal Action includes allegations similar to those in the Daskal Defendants' counterclaim in the present action and, it is noted, should properly have been raised as counterclaims in the present action. In the Daskal Action, the Daskal Defendants argue that the plaintiff released excessive funds under the loans to Green, based upon the amount of work that was completed, and continued to authorize funds without Daskal's authorization after Daskal made the plaintiff aware of Tyrnauer's purported fraud. Therefore, the Daskal Defendants seek to void the loans, cease the present foreclosure action, and be award compensatory damages from plaintiff.

The Daskal Defendants' contentions are insufficient to raise an issue of fact in opposition to the present motion. The opposition and complaint in the Daskal Action are completely devoid of any provisions in the Notes, Mortgages or Agreements that the plaintiff violated in releasing funds. It is further noted that, according to the complaint in the Daskal Action, Daskal's first purported contact with the plaintiff, regarding the alleged fraud by Tyrnauer, occurred on September 9, 2009. This was more than three years after entering into the loan Agreements and less than a month before Green defaulted. The Daskal Defendants have not identified any provision that required Daskal's individual authorization for the releasing of funds or gave Daskal the unilateral authority to prevent plaintiff from releasing funds.

The Tyrnauer Defendants argue that plaintiff's motion must be denied because no event of default occurred. Section 6.1 of the Mortgages defines an "Event of Default" to include:

> 6.1 **Failure in Payment of Indebtedness**. If the Mortgagor shall fail, refuse or neglect to pay, in full, any installment or portion of the Indebtedness within five (5) days after notice that the same shall be due and payable, whether at the due date thereof stipulated in the Loan Documents, or at a date fixed for prepayment, or by acceleration or otherwise.

Section 11.5 of the Mortgages indicates that all notices pursuant to the Mortgage "shall" be in writing and shall be effective when received by the addressees listed including 333-345 Green LLC, with additional copies to the law firm of "Lowenthal & Kofman, P.C." However, the Tyrnauer Defendants argue that the Notice of Default was not addressed to either of these entities but was instead addressed to Steven A. Weg and Michael T. Rogers at their respective law firms. The Tyrnauer Defendants acknowledge that Mr. Weg represented Tyrnauer and Mr. Rogers represented Mr. Daskal at that time. It is also noted that Mr. Weg still represents the Tyrnauer Defendants in all of the related actions and actually signed the affirmation on behalf of the Tyrnauer Defendants making the argument that the Notice of Default was insufficient. The Tyrnauer Defendants, notably, do not argue that they did not receive actual notice of the default or that they did not receive a copy of the Notice of Default.

Plaintiff argues that they substantially complied with the Mortgages as Tyrnauer and Daskal, as well as their attorneys, had actual notice of the default as the plaintiff worked with the parties for months, following the default, in an attempt to allow Green to cure the default. Further, plaintiff argues that the failure to object promptly to such notice constitutes waiver. Plaintiff also argues that the notice as described in section 11.5 of the Mortgages was unnecessary as this action was commenced after the Notes and Mortgages had already matured. Finally, plaintiff argues that notice was not actually required pursuant to section

6.9 of the Mortgages which indicates that a notice of default is not required in the event a holder of a lien on the Property forecloses as indicated in section 6.8 of the Mortgages. Plaintiff argues that two separate mechanic's liens on the Property have been foreclosed upon by Daley Construction of America, LLC ("Daley"), as a counterclaim in this action, and by Headquarters Mechanical Inc. in a separate proceeding (*Headquarters Mechanical Inc. v 333-345 Green LLC., et al.*, Index No. 28812/10).

The Tyrnauer Defendants' argument of an improper notice of default is unavailing. It is clear that the plaintiff substantially complied with the notice of default provision as the Daskal Defendants had actual notice of the default, were afforded an opportunity to cure the default, and the Notice of the Default otherwise complied with the terms of the Mortgages (*see Indymac Bank, F.S.B. v Kamen*, 68 AD3d 931 [2d Dept 2009]). The Tyrnauer Defendants' argument is especially disingenuous as Mr. Weg, who has represented the Tyrnauer Defendants from at least the date of the Notice of Default to the present, and was the recipient of the Notice of Default, is making the argument that the Notice of Default was insufficient. Further, as the Tyrnauer Defendants have "not claim[ed] the absence of actual notice or prejudice by the deviation" from the terms of the Mortgages, "strict compliance with contractual notice provisions need not be enforced" (*Fortune Limousine Serv., Inc. v Nextel Communications*, 35 AD3d 350, 353 [2d Dept 2006]). Accordingly, plaintiff's remaining contentions regarding the Notice of Default are rendered academic, and need not be addressed, and the Tyrnauer Defendants' third affirmative defense is stricken.

The Tyrnauer Defendants also argue that the plaintiff's failure to fund a September 2009 requisition by Green was a breach of contract that lead to the stalling of the Project and a number of mechanic's liens being placed on the Property. Green submitted a payment requisition application for $253,719.40 that was dated September 24, 2009, six days before the loan became due. Plaintiff did not release these funds and the Tyrnauer Defendants argue that the refusal to release the funds was a breach of the plaintiff's contractual obligation, citing to the "disbursement schedule" included in the Building Loan Agreement for this

proposition. However, the Tyrnauer Defendants have failed to identify any provision in the disbursement schedule that obligated the plaintiff to release funds within a certain period of time. As plaintiff argues, there is no such provision in the disbursement schedule.[5] Accordingly, the Tyrnauer Defendants' ninth affirmative defense is stricken.

The Tyrnauer Defendants' first affirmative defense, failure to state a cause of action, is stricken as plaintiff has set forth its *prima facie* case to foreclose upon the Mortgages as discussed above.

The Tyrnauer Defendants' second affirmative defense, raising the doctrine of temporary commercial impracticality, is stricken as the Tyrnauer Defendants have not sufficiently alleged any activities that would have rendered performance on the Property impossible and could not have been foreseen or guarded against in the Agreements (*see Warner v Kaplan*, 71 AD3d 1, 5 [1st Dept 2009]; *Pleasant Hill Developers v Foxwood Enterprises, LLC*, 65 AD3d 1203, 1206 [2d Dept 2009]).

The Tyrnauer Defendants' fourth, sixth, and seventh affirmative defenses for unclean hands, waiver and ratification, and equitable estoppel, respectively, are stricken as these pro-forma defenses are conclusory in nature and the Tyrnauer Defendants have failed to provide any specific factual allegations whatsoever in support of these defenses (*see Jo Ann Homes at Bellmore v Dworetz*, 25 NY2d 112, 122 [1969]; *New York State Mtge. Loan Enforcement & Admin. Corp. v North Town Phase II Houses*, 191 AD3d 151, 152 [1993]; *Federal Land Bank of Springfield v Azapian*, 98 AD2d 760, 760 [1983]; *Bruno v Sant'elia*, 52 AD3d 556,

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[5] The court also takes judicial notice that section D of the disbursement schedule specifically permits the plaintiff to withhold disbursements due to, among other reasons, "a reasonable doubt that the construction can be completed with the balance of Loan proceeds then undisbursed." As the myriad of issues relating to the completion of the Project have resulted in a copious amount of litigation before this court, there are no issues of fact as to whether the plaintiff had reasonable doubt that the construction could have been completed with the undisbursed balance of the loan. Therefore, there was a clear basis to withhold the loan proceeds pursuant to the Agreements even if Green had not defaulted on the loans six days later.

557 [2d Dept 2008]).

The Tyrnauer Defendants' fifth affirmative defense, that plaintiff's claims are barred by documentary evidence, is stricken as the Tyrnauer Defendants have not alleged the existence of any documentary evidence that would bar plaintiff's claims.

The Tyrnauer Defendants' eighth affirmative defense, substantial performance, or that any defaults were "immaterial and/or *de minimus*" is stricken as the Tyrnauer Defendants have not even denied that they defaulted under the terms of the Agreements and the failure to make the payment is clearly a material breach pursuant to the terms of the Notes and Mortgages (*see Johnson v Phelan*, 281 AD2d 394, 395 [2d Dept 2001]).

The Tyrnauer Defendants' tenth affirmative defense, asserting the doctrine of mutual mistake, is stricken as the affirmative defense is conclusory and the Tyrnauer Defendants have not raised an issue of fact as to whether the Notes and Mortgages were obtained as a result of mutual mistake (*see Home & City Sav. Bank v Jamel Realty Corp.*, 186 AD2d 936, 938 [3d Dept 1992]).

The Tyrnauer Defendants' eleventh affirmative defense for impossible performance due to acts or omissions by the City of New York, is stricken as it is conclusory and the Tyrnauer Defendants have not raised an issue of fact, or even alleged, that the City of New York or its agencies rendered performance under the Agreements impossible.

Both the Daskal and Tyrnauer Defendants contend that they require further discovery to oppose the present motion for summary judgment. Pursuant to CPLR 3212(f), if it appears from affidavits submitted in opposition to the motion for summary judgment "that facts essential to justify opposition may exist but cannot be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." However, "[m]ere hope and speculation that additional discovery might uncover evidence sufficient to raise a triable issue of fact is not sufficient" to warrant denial of a motion for summary judgment (*Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487, 488 [2006]). The granting of a summary judgment motion should not

be postponed to allow for discovery where the proponent of the additional discovery has failed "to demonstrate that the discovery sought would produce relevant evidence "(*Frith v Affordable Homes of Am.*, 253 AD2d 536, 537 [1998]). "A grant of 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 [2000]; *see also Freiman v JM Motor Holdings NR 125-139, LLC*, 82 AD3d 1154, 1156 [2011]; *Dempaire v City of New York*, 61 AD3d 816, 817 [2009]; *Conte v Frelen Assoc., LLC*, 51 AD3d 620, 621 [2008]; *Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760 [2006]; *Ruttura & Sons Constr. Co. v Petrocelli Constr.*, 257 AD2d 614, 615 [1999]).

It is noted that the original return date of this motion was August 10, 2011. At the July 27, 2011 compliance conference, the Tyrnauer and Daskal Defendants requested that this motion be adjourned for two months to allow for any additional discovery that may be needed to oppose the motion. Through numerous correspondence from plaintiff's counsel, dated August 5, 17, September 1, 2, 9, 13, and 15, 2011, plaintiff repeatedly advised the defendants to identify the additional discovery needed to oppose the motion and offered dates for a deposition of the plaintiff. However, neither the Tyrnauer Defendants, nor the Daskal Defendants, made any significant attempt to conduct discovery prior to the oral argument on October 5, 2011.[6] Plaintiff has indicated that more than 10,000 pages of document discovery has been provided to the defendants. The defendants' request for more time to obtain additional discovery was clearly a disingenuous attempt to stall the foreclosure of the

[6] The only apparent request for discovery in response to plaintiff's numerous correspondence was a one line E-mail from the Tyrnauer Defendants' counsel on September 1, 2011 asking to depose the plaintiff on September 16, 2011. This was followed by a reply from the Daskal Defendants' counsel, less than a half hour later, asking for another date due to a scheduling conflict. On September 9, 2011, per the Tyrnauer Defendants' request, plaintiff's counsel proposed new dates for the deposition during the week of September 19, 2011. Despite further E-mails from the Tyrnauer Defendants' counsel indicating that he was not available on the proposed dates, and accusing plaintiff's counsel of dilatory conduct, no other dates for a deposition were proposed by either the Tyrnauer or Daskal Defendants' counsel.

Property and the defendants have not shown that any further discovery would provide a basis for any of the defendants' asserted defenses. Consequently, there is no need to delay the determination of plaintiff's motion by virtue of CPLR 3212 (f) (*see Freiman*, 82 AD3d at 1156; *Dempaire*, 61 AD3d at 817; *Conte*, 51 AD3d at 621; *Lopez*, 34 AD3d at 760).

Plaintiff moves pursuant to CPLR 3212 for summary judgment or, alternatively, the severance of the defendants' cross-claims and counterclaims.

Daley filed an answer with general defenses, counterclaim and cross-claims. Daley, a carpentry subcontractor to WTC on the Project, alleged that it entered into a contract with WTC, WTC breached the contract, and Daley filed a mechanic's lien against the Property on March 8, 2010. Daley's counterclaim and cross-claims are to foreclose upon the mechanic's lien, and for an alleged breach of contract and unjust enrichment by WTC. Daley did not oppose the present motion. As plaintiff recorded the Mortgages on August 31, 2009, the plaintiff's Mortgages have priority over Daley's mechanic's lien. Plaintiff argues that because its mortgages have priority over Daley's liens, and plaintiff is entitled to a judgment of foreclosure, Daley's liens are extinguished. However, plaintiff has not cited sufficient authority to support this assertion. Even though plaintiff's Mortgages have priority over Daley's lien, to the extent that the liens are valid, Daley may be entitled to recover in the event there is a surplus after a foreclosure sale (*see* CPLR 1361; *Shankman v Horoshko*, 291 AD2d 441 [2d Dept 2002]).[7] With respect to Daley's cross-claims against WTC, WTC was not a party to the Mortgages or Notes and does not have an ownership interest in the Property. Accordingly, as neither Daley's counterclaim to foreclose upon its lien, nor its cross-claims against WTC, affect the plaintiff's foreclosure claim, and Daley has not opposed the motion, plaintiff is granted summary judgment as to Daley and Daley's counterclaim and cross-claims are hereby severed (*see* CPLR 3212; *Fleet Bank v Pine Knoll Corp.*, 290 AD2d

[7] It is noted that as Feldman filed two mechanic's liens on the Property on December 11, 2009, those liens appear to have priority over Daley's liens. As Feldman also submitted a demand for surplus monies pursuant to RPAPL 1361, Feldman's claim for surplus funds would similarly be addressed in the event there is a surplus after a foreclosure sale.

792, 794 [3d Dept 2002]).

The Tyrnauer Defendants argue that this court should deny the plaintiff's summary judgment motion as the Tyrnauer Defendants have alleged counterclaims against plaintiff. As discussed above, neither the Daskal nor Tyrnauer Defendants have raised an issue of fact as to whether the parties entered into the Agreements, Notes, Mortgages, Guarantys or whether Green defaulted on the Notes. Furthermore, the Tyrnauer Defendants' first counterclaim[8] includes a number of contentions that are nearly identical to the conclusory affirmative defenses addressed above. The Tyrnauer Defendants' second and third counterclaims seek to render indemnity provisions in the Agreements unenforceable. However, the Tyrnauer Defendants have not raised any issues of fact as to the enforceability of the indemnity provisions. Accordingly, the Tyrnauer Defendants' counterclaims are dismissed as they are conclusory and the Tyrnauer Defendants have not produced evidentiary proof sufficient to raise an issue of fact as to these claims (*see* CPLR 3212). The Tyrnauer Defendants' cross-claim for indemnity against Daskal is severed, to the extent that it is not duplicative of the numerous causes of action alleged against Daskal in the myriad of other actions before this court.

The Daskal Defendants also failed to raise any issues of fact as to the validity of the Notes and Mortgages or whether Green was in default. The Daskal Defendants' counterclaim alleges that plaintiff failed to properly release the funds pursuant to the Agreements. However, as discussed above, the opposition to the motion and allegations in the counterclaim are completely devoid of any provisions in the Notes, Mortgages or Agreements that the plaintiff purportedly violated in releasing funds. Accordingly, the Daskal Defendants' counterclaim is dismissed as they have not produced evidentiary proof sufficient to raise an issue of fact as to this claim.

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[8] The Tyrnauer Defendants' first counterclaim seeks a judgment declaring that Green did not breach the Agreements, Green substantially performed under the terms of the Agreements, plaintiff breached the Agreements by failing to provide payments, plaintiff breached the contract, and unclean hands.

As plaintiff properly served the motion on all parties, and there being no opposition, plaintiff's motion for default judgment against Moseson & Associates Corp., Builders Assistance Corp., RE Hanson Industries Inc., Tri-State Lumber Inc., Tri-State Brick & Stone of New York Inc., R. Klich Window & Door System, Inc., Falco Electrical Services, Inc., Supreme Flooring, Pucuda In./Leading Edge Safety Systems, the City of New York, the New York State Department of Taxation and Finance, and the New York City Environmental Control Board is granted pursuant to CPLR 3215.

Therefore, inasmuch as defendants have failed to demonstrate any triable issue of fact as to any defense in this foreclosure action, plaintiff is entitled to summary judgment in its favor, granting it a judgment directing the foreclosure and sale of the property, and appointing a referee to ascertain and compute the amounts due to it (*see Washington Mut. Bank, F.A.*, 63 AD3d at 833; *Daniel Perla Assoc., LP*, 40 AD3d at 677; *US Bank Trust N.A. Trustee*, 16 AD3d at 408; *Republic Natl. Bank of N.Y.*, 308 AD2d at 482).

CONCLUSION

Accordingly, plaintiff's motion for summary judgment pursuant to CPLR 3212, striking the affirmative defenses and counterclaims of 333-345 Green LLC, Martin Daskal, and Joseph Tyrnauer, WTC Construction Co. Inc is granted. Plaintiff's motion for summary judgment pursuant to CPLR 3212(e) for an order severing the cross-claims of 333-345 Green LLC, Joseph Tyrnauer, WTC Construction Co. Inc, and the cross-claims and counterclaim of Daley Construction of America LLC is granted. Plaintiff's motion for default judgment pursuant to CPLR 3215 against Moseson & Associates Corp., Builders Assistance Corp., RE Hanson Industries Inc., Tri-State Lumber Inc., Tri-State Brick & Stone of New York Inc., R. Klich Window & Door System, Inc., Falco Electrical Services, Inc., Supreme Flooring, Pucuda In./Leading Edge Safety Systems, the City of New York, the New York State Department of Taxation and Finance, and the New York City Environmental Control Board is granted.

Plaintiff's motion for an order of reference pursuant to Real Property Actions and

Proceedings Law 1321 is granted. Plaintiff is directed to submit a proposed order of reference, in accordance with the Kings County order of reference form and this order, on notice to all parties, within 30 days of this order.

The foregoing constitutes the decision and order of the court.

ENTER:

J.S.C.

HON. CAROLYN DEMAREST