IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
MORTGAGE FORECLOSURE/MECHANICS LIEN SECTION

SLATE REC JPM L.P., a Delaware limited partnership,

Plaintiff,

v.

SCGIF II – FRANKLIN, LLC, a Delaware Limited liability company; 900 TIC, LLC, a Delaware limited liability company; SHOPOFF LAND FUND IV, L.P., a Delaware limited partnership; SHOPOFF COMMERCIAL GROWTH & INCOME FUND II, L.P., a Delaware limited partnership; UNKNOWN OWNERS; and NON-RECORD CLAIMANTS,

Defendants.

Case Number 2024 CH 00557

Consolidated with

Case Number: 2024 CH 00561

Calendar 60

Honorable William B. Sullivan, Judge Presiding

SLATE REC JPM L.P., a Delaware limited partnership,

Plaintiff,

v.

DESPLAINES TIC 1, LLC; a Delaware limited liability company; DESPLAINES TIC 2, LLC; a Delaware limited liability company; SCGIF II – DESPLAINES, LLC, a Delaware limited liability company; SHOPOFF LAND FUND IV, L.P., a Delaware limited partnership; SHOPOFF COMMERCIAL GROWTH & INCOME FUND II, L.P., a Delaware limited partnership; UNKNOWN OWNERS; and NON-RECORD CLAIMANTS,

Defendants.

Property Addresses:
900 North Franklin Street,
Chicago, Illinois 60610

-AND-

242 North Des Plaines Street,
Chicago, Illinois 60661

MEMORANDUM OPINION AND ORDER

WILLIAM B. SULLIVAN, Circuit Judge:

Before the Court is Defendants CGIF II – FRANKLIN, LLC; 900 TIC, LLC (jointly "Borrowers"); SHOPOFF LAND FUND IV, L.P.; and SHOPOFF COMMERCIAL GROWTH & INCOME FUND II, L.P.'s (jointly "Guarantors") (all four collectively "Defendants") Motion to Dismiss Counts II-IV of the Complaint (Motion to Dismiss Complaint) and Plaintiff SLATE REC JPM L.P.'s ("Plaintiff") Motion to Dismiss Affirmative Defenses. For the following reasons, Defendants' Motion is hereby DENIED and Plaintiff's Motion is hereby GRANTED.

I. BACKGROUND

On or about April 5, 2022, Borrowers entered into a loan agreement ("Loan Agreement") and promissory note ("Note") in the amount of $15,100,000.00 secured by a mortgage ("Mortgage") on the property located at 900 North Franklin Street in Chicago, Illinois. In connection with the Loan, Guarantors and SREC Reit Holdings Inc. (Original Lender) also entered into a Guaranty of Recourse Obligations of Borrower & Partial Payment Guaranty ("Guaranty") on April 5, 2022.

The Note allegedly went into default and notice of default was sent to Franklin on November 13, 2023. Notice of acceleration was sent on December 6, 2023. Plaintiff filed its Complaint before this Court ("Franklin Case") on January 29, 2024. Defendants filed their Answer and Motion to Dismiss Complaint on March 25, 2024. Simultaneously, on January 29, 2024, Plaintiff also filed a Complaint in Case Number 2024 CH 00561 ("Des Plaines Case") which was proceeding before Judge Jean Cocozza. Defendants in the Des Plaines Case filed their Answer and

Motion to Dismiss Complaint on March 25, 2024, in that matter as well. Also on March 25, 2024, following a Motion to Consolidate filed in the Des Plaines Case, Presiding Judge Sophia Hall entered an Order of Consolidation, consolidating the Des Plaines Case into the Franklin Case before this Court. The Motions to Dismiss Complaint were presented on April 17, 2024. On the same date, the Court entered an Order granting a briefing schedule on the Motion filed in the Franklin Case and made clear that the ruling on the instant Motion would be applicable to both cases. Plaintiff timely filed its Response to Defendants' Motion to Dismiss Complaint on May 15, 2024. Defendants timely filed their Reply in support of the Motion to Dismiss Complaint on June 5, 2024.

In reply to Defendants' Answer, Plaintiff filed a Motion to Dismiss Affirmative Defenses contained therein on April 22, 2024, in the Franklin case. Plaintiff in the Des Plaines Case also filed a substantially similar motion. The Motions to Dismiss Affirmative Defenses were presented on May 9, 2024. On the same date, the Court entered an Order granting a briefing schedule on the Motion filed in the Franklin Case and made clear that the ruling on the instant Motion would be applicable to both cases as well. Defendants timely filed their Response to Plaintiff's Motion to Dismiss Affirmative Defenses on June 6, 2024. Plaintiff timely filed its Reply in support of the Motion to Dismiss Affirmative Defenses on June 27, 2024.

Oral argument on the Motion to Dismiss Complaint was held on June 24, 2024. After reading Defendants' Motion to Dismiss Complaint, Plaintiff's Response

thereto, Defendants' Reply in support of the Motion, and hearing oral argument from the parties' attorneys via Zoom, the Court entered an order taking the matter under advisement for the issuance of a written opinion on June 24, 2024.

Oral argument on the Motion to Dismiss Affirmative Defenses was held on July 16, 2024. After reading Plaintiff's Motion to Dismiss Affirmative Defenses, Defendants' Response thereto, Plaintiff's Reply in support of the Motion, and hearing oral argument from the parties' attorneys via Zoom, the Court entered an order taking the matter under advisement as well for the issuance of a written opinion on July 16, 2024. The Court's ruling as to both Motions to Dismiss in both matters follows.

II. LEGAL STANDARD

735 ILCS 5/2-619

Defendants now move this Court to dismiss Counts II, III, and IV of Plaintiff's Complaint pursuant to 735 ILCS 5/2-619(a). A "[d]efendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief." 735 ILCS 5/2-619(a). The Court holds the discretion of granting or denying the motion based on all of the factual evidence and questions raised by the parties. 735 ILCS 5/2-619(c). Under a Section 2-619 motion to dismiss, all well-pled facts and all reasonable inferences from those facts are admitted to be true, and the Court must construe the motion in the light most favorable to the non-moving party. *Kopf v. Kelly*, 2024 IL 127464, ¶ 63. "A motion to dismiss,

pursuant to section 2-619 of the Code, admits the legal sufficiency of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim." *Jackson v. Hehner*, 2021 IL App (1st) 192441, ¶ 25 (*quoting DeLuna v. Burciaga*, 223 Ill. 2d 49, 59). "[T]he movant is essentially saying "'Yes, the complaint was legally sufficient, but an affirmative matter exists that defeats the claim.'"" *Jackson*, 2021 IL App (1st) 192441, ¶ 25 (*quoting Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31). "Dismissal is permitted based on certain listed "defects" (735 ILCS 5/2-619(a)(1)-(8) (West 2020)) or some "other affirmative matter" (735 ILCS 5/2-619(a)(9) (West 2020)) outside the complaint." *Jackson*, 2021 IL App (1st) 192441, ¶ 25 (*citing Reynolds*, 2013 IL App (4th) 120139, ¶ 31).

735 ILCS 5/2-615

Plaintiff now moves this Court to dismiss Defendants' Affirmative Defenses pursuant to 735 ILCS 5/2-615. A motion to dismiss under 735 ILCS 5/2-615 "challenges the legal sufficiency of the (***) claim." *Kopf v. Kelly*, 2024 IL 127464, ¶ 63. A motion to dismiss under Section 2-615 requires the Court to construe the pleadings and other supporting documents in the most favorable light for the non-moving party, as the motion "admits as true all well pleaded facts and all reasonable inferences from those facts." *Id.*

Illinois, as a fact pleading jurisdiction, requires a pleading to allege ultimate facts that satisfy each element of the cause of action or affirmative defenses.

Spillyards v. Abboud, 278 Ill. App. 3d 663, 668 (1st Dist. 1996). In accordance with this standard, a pleading should only be dismissed when it appears a party "cannot recover under any set of facts". *Kilburg v. Mohiddin*, 2013 IL App (1st) 113408, ¶ 20. "A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved *under the pleadings* which will entitle the plaintiff to recover." *Van Horne v. Muller*, 705 N.E.2d 898, 902 (Ill. 1998) (emphasis added).

III. ANALYSIS

Before the Court is a question of whether Defendants' Motion to Dismiss Complaint and Plaintiff's Motion to Dismiss Defenses should be granted or denied. The Court will analyze both motions in turn.

A. Defendants' Motion to Dismiss Complaint

Defendants raise their Motion to Dismiss Counts II-IV of the Complaint based on the choice of law provision in the Mortgage, Loan Agreement, Guaranty, the amended and restated Note, and the amended and restated Mortgage (collectively "Loan Documents") that apply New York law pursuant to 735 ILCS 5/2-619. Counts II-IV that Defendants move to dismiss are as follows: foreclosure on personal property, breach of note, and breach of contract against Guarantors pursuant to the Guaranty. The Loan Agreement, Mortgage (along with its amended and restated counterpart), Note (along with its amended and restated counterpart), and Guaranty all contain a choice of law provision stating that New York law shall

be the governing law for these contracts. The Loan Agreement, Mortgage, and Note all have carve-out provisions that allow for exceptions to applying New York law. The Guaranty has no such provision.

Defendants do not address these carve-out provisions in their Motion to Dismiss. Defendants argue that the Counts of foreclosure on personal property (Count II), breach of the note (Count III), and breach of contract on the guaranty (Count IV) should be dismissed from the Complaint because New York law bars any other action to recover on the mortgage during or after a foreclosure suit takes place without leave of court in which the previous action was brought, under the Real Property Actions and Proceedings Law ("RPAPL") § 1301(3). N.Y. Real Prop. Acts. Law § 1301. Defendants also argue that there are no special circumstances in this case to create an avenue around this New York law.

Plaintiff's Response argues that the choice of law provisions contained in the Loan Agreement, Mortgage (along with its amended and restated counterpart), and Note (along with its amended and restated counterpart) do not apply in this action due to the carve-out provisions. The carve-out provisions contained in Loan Agreement and Note state the following language:

> PROVIDED HOWEVER, THAT WITH RESPECT TO CREATION, PERFECTION, PRIORITY, AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED BY THIS AGREEMENT, THE SECURITY INSTRUMENT AND OTHER LOAN DOCUMENTS, AND THE DETERMINATION OF DEFICIENCY JUDGMENTS, THE LAWS OF THE STATE WHERE THE PROPERTY IS LOCATED

> SHALL APPLY. (Pl.'s Resp. to Def.'s Mot. Ex. A, at 128; Pl.'s Resp. to Def.'s Mot. Ex. B, at 3).

Interestingly, the carve-out provision contained in the Mortgage states:

> PROVIDED HOWEVER, THAT WITH RESPECT TO CREATION, PERFECTION, PRIORITY, AND ENFORCEMENT OF THE LIEN OF THIS SECURITY INSTRUMENT, AND THE DETERMINATION OF DEFICIENCY JUDGMENTS, THE LAWS OF THE STATE WHERE THE PROPERTY IS LOCATED SHALL APPLY. (Pl.'s Resp. to Def.'s Mot. Ex. C, at 21).

Plaintiff argues that Counts II-IV of the Complaint are related to the enforcement of liens and security interests; therefore, Illinois law should apply.

Plaintiff also argues that Defendants have misconstrued New York foreclosure law by over-broadening the scope of RPAPL. Plaintiff interprets RPAPL § 1301(3) to prevent plaintiffs from bringing other lawsuits to try and recover more than once on the same mortgage, which cannot happen in this case because all of the claims are taking place in one courtroom, in front of one judge, and in a single lawsuit. Defendants argue that the term "action" in Illinois refers to each separate cause of action, so in this case, there would currently be 4 actions—one for each of the Counts. Under Defendants' interpretation of the term "action" and RPAPL § 1301(3), the statute would still preclude Counts II-IV from being brought even in the same proceedings.

Plaintiff also argues that RPAPL does not apply in this case because it only applies to property within the State of New York, citing New York state, federal, and other state court cases that support this argument. Plaintiff lastly argues that

Defendants waived their right to make an election of remedies or one-action argument pursuant to New York law in the Loan Agreement that Borrowers signed. The waiver in the Loan Agreement states, "[b]orrower agrees that if an Event of Default is continuing (i) Lender is not subject to any 'one action' or 'elections of remedies' law or rule." (Pl.'s Compl. Ex. K, at 117).

Defendants in their Reply contend that the Loan Documents' carve-out provisions do not provide for the application of Illinois Law, and thus, do not apply to Counts II-IV. Borrowers quote the Mortgage's carve-out provision which states:

> PROVIDED HOWEVER, THAT WITH RESPECT TO THE CREATION, PERFECTION, PRIORITY AND ENFORCEMENT OF THE LIEN OF THIS SECURITY INSTRUMENT, AND THE DETERMINATION OF DEFICIENCY JUDGMENTS, THE LAWS OF THE STATE WHERE THE PROPERTY IS LOCATED SHALL APPLY. (Pl.'s Compl. Ex. M, 20).

Borrowers argue that this provision does not apply to Counts II-IV because none of these Counts seek to enforce the Mortgage lien.

The Borrowers then quote the carve-out provision in the Loan Agreement which states:

> PROVIDED HOWEVER, THAT WITH RESPECT TO THE CREATION, PERFECTION, PRIORITY AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED BY THIS AGREEMENT, THE SECURITY INSTRUMENT AND THE OTHER LOAN DOCUMENTS, AND THE DETERMINATION OF DEFICIENCY JUDGMENTS, THE LAWS OF THE STATE WHERE THE PROPERTY IS LOCATED SHALL APPLY. (Pl.'s Compl. Ex. K, at 128).

Noting the difference in the language of the two provisions cited above, Borrowers still contend that the carve-out in the Loan Agreement does make the choice of law provisions applicable as to Counts II-IV. Defendants state, "[w]hile this may broaden the scope of Illinois law to the foreclosure of personal property under Count II, the 'carve-out' clearly does not apply to the in personam [*sic*] actions found in Counts III and IV," based upon the carve-out provision in the Loan Agreement. (Def.'s Reply to Def.'s Mot., at 3).

Borrowers then proceed to point out that the waiver in the Loan Agreement of election of remedies and one-action rule that Plaintiff cites in its Response has a caveat, "[t]o the extent permitted by Applicable Law." (Pl.'s Compl. Ex. K, at 117). Therefore, if New York Law and RPAPL apply, then Plaintiff's Counts II-IV should be dismissed. Guarantors also point out that the Guaranty does not have a carve-out provision within the agreement; therefore, there is no question as to whether New York Law should apply to Count IV.

Defendants argue against Plaintiff's claim that RPAPL does not apply outside the state of New York by distinguishing the New York cases that Plaintiff cited in its Response and finding its own supporting New York case, *Union Realty Partners, Ltd. v. Menicucci*, 270 A.D.2d 339 (App. Div. 2nd Dept. 2000).

1. *Applicable Law*

When it comes to choice of law provisions in contracts, the State of Illinois only applies the substantive law of another state, not the procedural law. *Freeman*

v. Williamson, 383 Ill. App. 3d 933, 938-39 (2008). New York RPAPL §1301(3) is a statute that controls how a plaintiff may plead its complaint, thus constituting a procedural law, not a substantive law. *Citibank, N.A. v. Errico*, 251 N.J. Super. 236, 242-43 (Super. Ct. App. Div. 1991); *Light v. Granatell*, 171 N.J. Super. 557, 562 (Super. Ct. App. Div. 1979).

Regarding RPAPL § 1301 and § 1371, many courts have held that at least *these* sections do not have any application to cases involving real property outside of the State of New York. *FDIC v. De Cresenzo*, 207 A.D.2d 823 (App. Div. 2nd Dept. 1994); *Lombardo v. Fielding*, 225 A.D.2d 672, 672-273 (App. Div. 2nd Dept. 1996); *Wells Fargo Bank v. Kokolis*, No. 12-cv-2433 (DLI) (JO), 2013 U.S. Dist. LEXIS 31070, (E.D.N.Y. Mar. 1, 2013); *U.S. Bank v. NNN 200 Galleria, LLC*, 2014 U.S. Dist. LEXIS 185977, 11-12 (S.D.N.Y. July 21, 2014). Even the New York statutes that preceded RPAPL § 1301 did not apply to property outside the State of New York. *Fielding v. Drew*, 94 A.D.2d 687 (App. Div. 1st Dept. 1983). Although the Court in *Menicucci* did apply RPAPL § 1371 to a property located in New Jersey, that case conflicts with all of the previously cited precedent. *Menicucci*, 270 A.D.2d at 339.

2. *Discussion*

Before the Court is the question of whether Counts II-IV of Plaintiff's Complaint should be dismissed. For the following reasons, Defendants' Motion is denied as to all Counts.

Borrowers' Motion as it relates to Count II, foreclosure on personal property, is denied for the following reason. The Loan Agreement's carve-out provision states:

> PROVIDED HOWEVER, THAT WITH RESPECT TO THE CREATION, PERFECTION, PRIORITY AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED BY THIS AGREEMENT, THE SECURITY INSTRUMENT AND THE OTHER LOAN DOCUMENTS, AND THE DETERMINATION OF DEFICIENCY JUDGMENTS, THE LAWS OF THE STATE WHERE THE PROPERTY IS LOCATED SHALL APPLY. (Pl.'s Compl. Ex. K, at 128).

Borrowers' argument for the dismissal of Count II-IV is solely based on the application of New York law: RPAPL § 1301(3). The Loan Agreement and Note contain language in the carve-out provision to the choice of law provision stating that "[e]nforcement of liens and security interests created by this agreement." (Pl.'s Compl. Ex. K, at 128). This clearly creates an exception to applying New York law. The Loan Agreement's creation of a security interest in the personal property listed in the Loan Agreement fits into this exception. Plaintiff's Count II, foreclosure of personal property, is an attempt to enforce the Plaintiff's security interest in the personal property that was created by the Loan Agreement. Borrowers arguably concede to this argument in their response to the motion when stating, "[w]hile this may broaden the scope of Illinois law to the foreclosure of personal property under Count II, the 'carve-out' clearly does not apply to the in personam [*sic*] actions found in Counts III and IV," based upon the carve-out provision in the Loan Agreement. (Def.'s Reply to Def.'s Mot., at 3). This Court finds that the carve-out provision applies to Count II, and this alone is reason enough to deny Defendants' Motion to Dismiss the Complaint in regards to Count II.

Second, Defendants have based their interpretation of RPAPL § 1301(3) on the definition of action in Illinois law. Defendants' idea that Illinois law defines action as any single cause of action is incorrect. Defendants' misunderstanding of the definition of action has led to Defendants misconstruing New York foreclosure law by over-broadening the scope of RPAPL § 1301(3) to preclude bringing multiple causes of action in one court case. Plaintiff interprets RPAPL § 1301(3) to prevent plaintiffs from bringing other lawsuits to try and recover more than once on the same mortgage, which cannot happen in this case because all of the claims are taking place in one courtroom, in front of one judge, and in a single lawsuit. 810 ILCS 5/1-201 states, "'Action', in the sense of a judicial proceeding, includes recoupment, counterclaim, set-off, suit in equity, *and* any other proceeding in which rights are determined." 810 ILCS 5/1-201(b)(1) (emphasis added). In the previous quote the word "and" indicates that an "action" includes all of the Counts in the proceeding. Therefore, even if RPAPL § 1301(3) did apply to the instant case it would still not warrant the dismissal of Counts II-IV. This Court finds that using the proper definition of "action" when interpreting RPAPL § 1301(3) does not preclude Plaintiff from bringing Counts II-IV, and again, this alone is reason enough to deny Defendants' Motion to Dismiss the Complaint in regards to Counts II, III, and IV.

Third, although both Plaintiff and Borrowers argue whether RPAPL as a whole applies to property outside of New York, this Court will only look at the

specific section at issue that Defendants are attempting to invoke in their Motion: RPAPL § 1301. Regarding choice of law provisions in Illinois, *Tuna v. Wisner* states that when applying another jurisdiction's substantive law in an Illinois court, the Illinois court must follow the other jurisdiction's law. 2023 IL App (1st) 211327, ¶ 61. "Law," as defined by Black's Law Dictionary, includes the judicial decisions of courts; therefore, this Court must follow the judicial decisions of New York since that is the jurisdiction that applies to the Guaranty. Black's Law Dictionary 796 (5th ed. 1979). In this Court's mind, this treatment towards New York cases creates a quasi-binding precedent to be followed. Quasi-binding is a term this Court will use to loosely describe the application of another state's law. It is well established that each state's courts are entirely bound by its respective state precedent; however, when presented with the task of applying another forum's law, that law *must* be followed, insinuating that under particular circumstances, a court may have to give what would usually be persuasive precedent binding weight. Defendant has asked this Court to follow the decisions of New Jersey and Texas courts that apply New York law. This Court will treat those cases as the persuasive precedent that they are. New York cases and their quasi-binding precedential status must hold more weight than any persuasive precedent. Given the difference in weight that the cases cited in the briefs hold, this Court will look to New York cases and respect a New York court's expertise in applying New York law rather than look at how other states have interpreted New York courts interpreting New York law. This is similar

to when federal courts exercise supplemental jurisdiction over state causes of action, and in so doing, apply state law. Those federal courts seek to apply the law based upon how they best believe a court in the forum whose law they are applying would. *See Glatz v. Marshall County Sheriff Office*, No. 16-1152, 2016 U.S. Dist. LEXIS 89196, at *4 (C.D. Ill. July 11, 2016).

RPAPL § 1301 has been overwhelmingly found to not apply to property outside of New York. *De Cresenzo*, 207 A.D.2d 823 (App. Div. 2nd Dept. 1994); *Wells Fargo Bank Minnesota, N.A. v. Cohn*, 2003 N.Y. Misc. LEXIS 2006 (Sup. Ct. July 23, 2003). New York Courts do not apply RPAPL § 1301 to out-of-state property; therefore, even if New York procedural law is applied, a New York court would not apply RPAPL § 1301 to the instant case. *Id.* This Court, which must follow the law of the chosen jurisdiction, shall not do so either. Therefore, RPAPL § 1301 does not apply in the present case and Counts II-IV cannot be dismissed based on this law and any argument inapposite is not persuasive. This Court finds that New York case law is clear that RPAPL § 1301 does not apply to property outside of the State of New York and this is also reason enough to deny Defendants' Motion to Dismiss the Complaint in regards to Counts II, III, and IV.

Lastly, the Court will discuss an argument that was not raised by the parties, but feels is important and also dispositive. Choice of law provisions under Illinois law only apply to the substantive law of the choice jurisdiction, not the procedural law, and RPAPL § 1301 is undoubtedly a procedural law. *Cox v. Kaufman*, 212 Ill.

App. 3d 1056, 1062 (1991); *Freeman v. Williamson*, 383 Ill. App. 3d 933, 938-39 (2008); *Light v. Granatell*, 171 N.J. Super. 557, 563 (Super. Ct. App. Div. 1979). *Cox* and *Freeman* establish that Illinois courts are to apply the forum state's procedural law (Illinois procedural law here) and the choice state's substantive law (New York substantive law here) when interpreting contractual choice of law provisions. *Cox*, 212 Ill. App. 3d at 1062; *Freeman*, 383 Ill. App. 3d at 938-39. *Light*, a New Jersey case, also establishes that RPAPL § 1301 is a procedural law. *Light*, 171 N.J. Super. at 563. Finally, the name of the statute itself is Real Property and *Proceedings* Law, thus indicating the same. These combined factors lead the Court to find that RPAPL § 1301 is a procedural law, ergo under *Cox* and *Freeman* the law that Defendants are attempting to invoke cannot and will not be applied in this case to dismiss Counts II-IV. For this reason, too, the Court allows Counts II-IV of Plaintiff's Complaint to stand.

Accordingly, Defendants' Motion to Dismiss Counts II-IV of Plaintiff's Complaint is DENIED. Defendants, having already filed their answer to Plaintiff's Complaint, are at issue with Plaintiff, and further leave to answer or otherwise plead to the Complaint is unwarranted at this juncture.

As agreed upon by the parties, this holding with regards to Defendants' Motion to Dismiss Complaint in the instant case (the Franklin Case) shall also apply to its consolidated counterpart (the Des Plaines Case), and, accordingly, the

Motion to Dismiss Complaint in the Des Plaines Case is also DENIED for the same reasoning as well.

B. Plaintiff's Motion to Dismiss Affirmative Defenses

Plaintiff also moves this Court to dismiss all three of Defendants' Affirmative Defenses raised in their Answer as well as the Additional Defenses Reserved Clause ("Reservation Clause") contained therein pursuant to 735 ILCS 5/2-615. Defendants' Affirmative Defenses are as follows: Failure of Conditions Precedent which is raised by all Defendants ("First Affirmative Defense"), Waiver of Strict Compliance which is raised by Borrowers only ("Second Affirmative Defense"), and Anti-Deficiency Law which is raised by Guarantors only ("Third Affirmative Defense"). Defendants also included a reservation to raise future defenses titled "Additional Defenses Reserved" if and when they arise during the litigation. The Court will now discuss each affirmative defense and the Reservation Clause, the parties' arguments, the applicable law, and this Court's holding in sequence.

1. *First Affirmative Defense (Failure of Conditions Precedent)*

The First Affirmative Defense avers that Plaintiff failed to follow conditions precedent as required by the Loan Documents prior to instituting the present action. Plaintiff now moves this Court to dismiss Defendants' First Affirmative Defense.

First, Plaintiff argues that the First Affirmative Defense (Failure of Conditions Precedent) should be dismissed because it gives no color to the foreclosure suit and attacks Plaintiff's right to bring the action. Plaintiff argues that

no such conditions precedent exist in the mortgage. The First Affirmative Defense argues that the notices Plaintiff sent to Defendants did not comply with the implied terms of the Loan Documents. This demand is standard in residential mortgages, but this is a commercial loan.

Defendants argue that in regard to its First Affirmative Defense Plaintiff waived its right to the waiver of notice by sending notice to Defendants. Thus, the notice was insufficient because it lacked an amount Defendants needed to pay to cure the default and the date by which Defendants needed to make said payment. Pursuant to the Guaranty § (1)(e), Defendants also contend that the notice letters were also demand letters and it is implied that a demand to pay would necessarily need to list the amount sought as due. Plaintiff then contends that even if it waived its right to the waiver of notice, this does not create the standard contractual obligations for notice that most residential mortgages contain or obligations that are not contained within the contracts at issue here.

"A 'condition precedent' is an act that must be performed or an event that must occur before a contract becomes effective or before one party to an existing contract is obligated to perform." *Cathay Bank v. Accetturo*, 2016 IL App (1st) 152783, ¶ 32. An express condition precedent also must comply with strict compliance, inversely an implied condition precedent is not required to comply with strict compliance. *Id.* When determining if a condition is precedent, a court must rely on the intentions of the parties and not the phrasing or form of the contract. *Department of Public Works & Buildings v. Porter*, 327 Ill. 28, 35 (1927).

The problematic aspect of Defendants' First Affirmative Defense is that none of the Loan Documents include any condition precedent within the notice provisions (which infact waive notice) requiring that if notice is sent, such notice must contain an amount due and the due date to pay that amount. (Pl.'s Compl. Ex. K, at 131-32, Ex. E, at 5, Ex. M, at 16; Ex. L, at 2). The Loan Documents also all include a no-oral change provision requiring that modification of the agreements must be signed and in writing. (Pl.'s Compl. Ex. K, at 129, Ex. E, at 13, Ex. M, at 22, L, at 2). Defendants also did not plead any facts that the current Loan Documents were modified in writing regarding the waiver of notice, giving the Court no relevant facts to view in the light most favorable to Defendants in support of their First Affirmative Defense. Defendants' argument that Plaintiff waived the waiver of notice in the Loan Documents is erroneous on its face. Even if this argument was supported by well-pled facts—which it is not—this Court will not imply terms that are not contained within the agreements or added via implication as Defendants argue. *See Carter Oil Co. v. Dees*, 340 Ill. App. 449, 458, 92 N.E.2d 519, 523 (4th Dist. 1950) ("Courts do not, and cannot, undertake to make a new contract for the parties. An implied provision, (***), is only asserted to carry out the manifest intention of the contract"); *see also Schweihs v. Davis, Friedman, Zavett, Kane & MacRae*, 344 Ill. App. 3d 493, 499 (1st Dist. 2003) ("In general, courts will enforce contracts as written, and they will not rewrite a contract to suit one of the parties"); *and People ex rel. Illinois State Scholarship Com. v. Harrison*, 67 Ill. App. 3d 359, 360 (1st Dist. 1978) ("[W]hen a contract is unambiguous, the duty of the court is to

enforce the terms which the parties included in the contract. (***) A court may not rewrite the contract the parties have made and in the absence of ambiguous language may not reform the agreement"). Considering that the language waiving notice is consistent and unambiguous throughout all four contracts, the manifest intention of the Loan Documents was clearly to not require notice or an amount due at all. Additionally, nothing in the agreements indicates that if Plaintiff does send notice out as a best business practice, then the waiver of notice in the operative contacts here would be deemed inapplicable and the terms of a residential mortgage notice provision would be imputed. For these reasons, the mere fact that Plaintiff sent notice, but was not required to cannot and does not obfuscate the plain language of the Loan Documents that patently does not require notice and are entirely silent as to what that notice (if any is voluntarily sent) must contain. Since the Court cannot and will not rewrite the parties' agreements, Defendants' arguments towards this end are wholly unavailing.

The two notices that Plaintiff sent to Defendants contain therein a demand for payment. Additionally, to the extent that both letters are considered demand letters under the Guaranty, both still comply therewith and payment from Guarantors would be due to Plaintiff within 10 days of date of those letters. (Def.'s Resp. Ex. P, 6/6/2024; Pl.'s Compl. Ex. E, at 2). Therefore, even if the notice letters are viewed through the lens of a demand letter, they are still sufficient under the Guaranty to place Guarantors on notice of Borrowers' default, thereby triggering the terms of the Guaranty. Nothing in the Guaranty requires that a demand letter

contain any specific information whatsoever, nor does anything in the Guaranty change any of the rights of the Borrowers in their separately executed contracts. The Guaranty's silence as to what, if any, language need be contained in a demand letter invokes this Court's already stated position on implying language into contracts. Therefore, Guarantors' argument that the demand letters should have contained an amount due and the specific date by which they had to tender payment to Plaintiff is baseless.

It is worth noting that where the language of the Loan Documents for this commercial mortgage is silent as to any presuit conditions precedent, strict compliance is not required simply because there are no conditions preceden that need to be strictly complied with. This blatant absence of any condition precedent means that unambiguously, no set of facts exist that could enable the Defendants to plead such an affirmative defense here. Thus, for these reasons, Plaintiff's Motion to Dismiss Affirmative Defenses is GRANTED and the First Affirmative Defense is dismissed with prejudice.

2. *Second Affirmative Defense (Waiver of Strict Compliance)*

The Second Affirmative Defense contends that Plaintiff breached the Loan Agreement by not giving reasonable consent to lease agreements entered into by Borrowers, thus precluding one of the events of default that the foreclosure claim is based upon. Plaintiff now moves this Court to dismiss this Second Affirmative Defense.

For the Second Affirmative Defense (Waiver of Strict Compliance), Plaintiff argues that the claim that it waived strict compliance only combats Plaintiff's right to bring the foreclosure suit and is thus not a proper Affirmative Defense. The waiver of strict compliance that Borrowers allege in their answer is when Plaintiff "unreasonably" withheld consent to lease agreements Borrowers entered into. This is an attack on Plaintiff's right to bring the foreclosure action because one of the default events that Plaintiff alleges in its complaint is that Borrowers entered into lease agreements without Plaintiff's consent.

Borrowers argue that the Second Affirmative Defense is not just a blatant denial of the allegation that they entered into lease agreements without the consent of Lender, nor that Borrowers did not give color to Plaintiff's allegation when pleading the Second Affirmative Defense. Borrowers then proceed to point out that Plaintiff focuses on the use of the word "waived" in the Affirmative Defense when the important language is "breached." Borrowers contend that the Second Affirmative Defense affirms the allegation that they entered into lease agreements without the consent of Plaintiff and then adds the claim that consent was withheld unreasonably, thereby alleging that Plaintiff breached Section 5.1.17 of the Loan Agreement. Borrowers conclude that when viewing the facts in the light most favorable to Borrowers, the claim that Plaintiff unreasonably withheld its consent to the lease agreements that Borrowers entered into would defeat the foreclosure claim.

"[C]onclusions of law or fact contained within the challenged pleading will not be taken as true unless supported by specific factual allegations," *Praither v. Northbrook Bank & Tr. Co.*, 2021 IL App (1st) 201192, ¶ 50; citing *DeWoskin v. Lowe's Chicago Cinema*, 306 Ill. App. 3d 504, 513-14, 714 N.E.2d 1047, 239 Ill. Dec. 750 (1999). "Instead, courts must disregard conclusions of fact, unsupported by factual allegations" *Praither*, 2021 IL App (1st) 201192, ¶ 50.

The Second Affirmative Defense fails due to the lack of supporting well-pled facts. The only and closest thing to a factual pleading supporting the Second Affirmative Defense in Defendants' answer indicates, "[t]o the extent Plaintiff asserts that Borrower entered into certain Leases without the consent of Plaintiff, the withholding of such consent by Plaintiff was unreasonable and a breach of Plaintiff's obligation not to unreasonably withhold such consent." (Def.'s Answer, at 21). This is clearly a conclusion of fact that needs to be supported by well-pled factual allegations, and, because it is not supported, it must be disregarded. *Praither*, 2021 IL App (1st) 201192, ¶ 50. This leaves the Second Affirmative Defense unsupported, thus necessitating dismissal. For these reasons, Plaintiff's Motion to Dismiss Affirmative Defenses is GRANTED and the Second Affirmative Defense is dismissed without prejudice.

3. *Third Affirmative Defense (Anti-Deficiency Law)*

The Third Affirmative Defense purely raises the application of RPAPL § 1371 to the instant case. For the Third Affirmative Defense Plaintiff argues that this affirmative defense also does not give color to the foreclosure suit and cannot defeat

Plaintiff's claim. Plaintiff continues that RPAPL § 1371 only applies to the calculation of deficiency damages recoverable and does not defeat its claim. Also, Plaintiff contends that given the carve-out provision in the Loan Agreement, Mortgage, and Note Illinois law would apply to this case; not New York Law. Lastly, Plaintiff argues that even if New York law would apply, RPAPL § 1371 does not apply to property outside of the State of New York.

Guarantors' position on this Third Affirmative Defense is that RPAPL § 1371 calculates the amount of liability for Guarantors rather than a damages calculation. Also, they argue that the Guaranty does not have a carve-out provision; and, therefore, New York Law applies including § 1371 of RPAPL. Guarantors additionally assert that RPAPL § 1371 describes how a court shall calculate damages when a deficiency judgment is ordered and compares that to 820 ILCS 303/5(a) which precludes parties that could recover from recovering outside of the Workers Compensation statute. The Illinois Supreme Court ruled that 820 ILCS 303/5(a) must be raised as an affirmative defense. Guarantors' believe that RPAPL § 1371 and 820 ILCS 305/5(a) are akin; and, thus, RPAPL § 1371 is a viable affirmative defense.

Regarding choice of law provisions *Tuna v. Wisner* states, "[i]f we determine that another jurisdiction's substantive law *should* apply, we choose to follow *that* law." 2023 IL App (1st) 211327, ¶ 61 (emphasis added). Black's Law Dictionary defines law in part as "judicial decisions, judgments or decrees" Black's Law Dictionary 796 (5th ed. 1979) (internal citations omitted). Therefore, under choice of

law, when choosing to follow a jurisdiction's law, the judicial decisions of that jurisdiction fall under that umbrella and must be followed. Lastly, see page eleven *supra* for the applicable law regarding RPAPL § 1371.

The Third Affirmative Defense has multiple problems; starting with whether RPAPL § 1371 even applies since the property in the instant case is not located within the State of New York. The Guaranty's choice of law provision establishes that this Court is to apply New York substantive law. When applying New York law, this Court must substantively follow the judicial decisions of that state in the instant case, as previously discussed. *Wisner*, 2023 IL App (1st) 211327, ¶ 61; Black's Law Dictionary 796 (5th ed. 1979). Also, the majority of New York courts have held that RPAPL § 1371 does not apply outside the State of New York. *Lombardo v. Fielding*, 225 A.D.2d 672, 672-273 (App. Div. 2nd Dept. 1996); *Taylor v. Daniel*, No. 808926-2021E, 2022 N.Y. Misc. LEXIS 31415, 13 (Sup. Ct. Dec. 20, 2022) (citing *US Bank National Association v. NNN 200 Galleria, LLC*, US Dist C, SDNY, 13 Civ. 414); *Museum Building Holdings Llc v. Schreiber*, 2023 NYLJ LEXIS 1367, 9. This Court will follow the majority of New York cases and disregard the ruling in *Menicucci*.

Next, to survive dismissal, an affirmative defense must raise the possibility to be able to defeat a claim. *JPMorgan Chase Bank v. East-West Logistics*, L.L.C., 2014 IL App (1st) 121111, ¶ 31. Even if RPAPL § 1371 did apply in the instant case—this Court finds that it does not—the Third Affirmative Defense would still not be able to defeat Plaintiff's claim. *Kilburg v. Mohiddin*, 2013 IL App (1st)

113408, ¶ 20. This Court agrees with Plaintiff that RPAPL § 1371 directs a court on calculating damages for a deficiency judgment against the party liable for such damages. Guarantors in their argument cite cases that explain that 820 ILCS 305/5(a) (a maximum amount plaintiffs can receive under workers compensation) is an affirmative defense that must be raised by a defendant and compare this Illinois statute to New York's RPAPL § 1371. *See Virgina Sur Co., Inc. v. Northern Ins. Company of New York*, 224 Ill 2d. 550, 558 (2007), *See also, Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 77 (2002). The differences between the 820 ILCS 305/5(a) (*Kotecki* damage cap) and RPAPL § 1371 are too great for this Court to find that RPAPL § 1371 is a proper affirmative defense. RPAPL § 1371 creates two equations for determining deficiency judgment and guides a court to choose the lower amount. N.Y. Real Prop. Acts. Law § 1371. 820 ILCS 305/5(a) (*Kotecki* damage cap) allows for an employee to sue an employer outside the Workers' Compensation Statute of Illinois unless the employer raises the affirmative defense invoking the Workers' Compensation Statute. 820 ILCS 305/5(a). RPAPL § 1371 is a definite statute that New York courts must follow when it comes to deficiency judgments, whereas 820 ILCS 305/5(a) (*Kotecki* damage cap) is an indefinite statute that must be invoked by a defendant to essentially defeat a plaintiff's claim under personal injury law and invoke the Workers' Compensation Act. RPAPL § 1371's lack of defeating liability is fatal to the Third Affirmative Defense. For these reasons, Plaintiff's Motion to Dismiss Affirmative Defenses is GRANTED, and the Third Affirmative Defense is dismissed with prejudice.

4. *Additional Defenses Reserved*

The Additional Defenses Reserved is raised at the end of Defendants' Answer reserving the right to add more affirmative defenses as they may arise throughout the lawsuit. Plaintiff moves this Court to strike this language.

Plaintiff also attacks the reservation for additional affirmative defenses in Defendants' Answer, stating that Defendants must plead affirmative defenses that they know at the time of filing their Answer. Plaintiff also states that to raise new affirmative defenses, Defendants must obtain leave of Court and refile their Answer with new affirmative defenses. Defendants do not address this point in their Response to the Motion to Dismiss Affirmative Defenses.

Defendants' Reservation Clause states, "[d]efendants hereby give notice that they may rely upon other defenses if and when such defenses become known during the course of litigation, and hereby reserve the right to amend their answer to assert other defenses as become known or available." (Def.'s answer, at 22.)

"Although leave to amend should generally be granted freely, a party's right to amend a pleading is not absolute." *Avila v. Chi. Transit Auth.*, 2021 IL App (1st) 190636, ¶ 56. The Reservation Clause's superfluous language is misplaced because a party has the *right to ask* the court for leave to amend their answer to assert new affirmative defenses and cannot reserve such a right in a lawsuit unilaterally. *Avila*, 2021 IL App (1st) 190636, ¶ 56 (emphasis added). For this reason, Plaintiff's Motion to Strike the Reservation Clause is GRANTED, and the Reservation Clause

is stricken with prejudice. However, if Defendants wish to amend their Answer or Affirmative Defenses in the future Defendants may file a motion to do so.

As agreed upon by the parties, this holding with regard to Plaintiff's Motion to Dismiss Affirmative Defenses and to Strike the Reservation Clause in the instant case (the Franklin Case) shall also apply to its consolidated counterpart (the Des Plaines Case), and, accordingly, the Motion to Dismiss Affirmative Defenses and to Strike the Reservation Clause in the Des Plaines Case is also GRANTED for the same reasoning as well.

IV. CONCLUSION

For all the reasons mentioned herein, Defendants' Motion to Dismiss Counts II-IV is DENIED, and Plaintiff's Motion to Dismiss Affirmative Defense is GRANTED.

THEREFORE, FOR THE AFOREMENTIONED REASONS, THE COURT HEREBY ORDERS AS FOLLOWS:

(1) Defendants' Motion to Dismiss Counts II-IV is hereby DENIED;

(2) Plaintiff's Motion to Dismiss Affirmative Defenses is hereby GRANTED:

(a) Defendants' Affirmative Defense 1 (Conditions Precedent) is hereby DISMISSED WITH PREJUDICE;

(b) Borrowers' Affirmative Defense 2 (Waiver of Strict Compliance) is hereby DISMISSED WITHOUT PREJUDICE;

(c) Guarantors' Affirmative Defense 3 (Anti-Deficiency Law) is hereby DISMISSED WITH PREJUDICE;

(d) Defendants' Reservation Clause is hereby STRICKEN WITH PREJUDICE from Defendants' Answer;

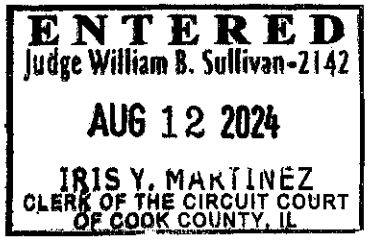
(3) Borrowers shall have 28 days from the date of entry of this Order to replead Affirmative Defense 2 (Waiver of Strict Compliance); and

(4) All rulings contained herein regarding the Motions filed in the Franklin Case shall apply to the reciprocal Motions filed in the Des Plaines Case in Case Number 2024CH00561.

IT IS SO ORDERED.

Date: August 12, 2024

ENTERED:



Honorable William B. Sullivan
Cook County Circuit Judge

ORDER PREPARED BY THE COURT
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