SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART** **12M**

Justice

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144 SULLIVAN STREET EQUITIES, INC.,

Plaintiff,

- v -

CRAIG WEISS, MORTON-BARROW OWNERS CORP., WELLS FARGO BANK, N.A., and MARGARET BAISLEY, ESQ.

Defendants.

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INDEX NO. 161637/2018

MOTION DATE 09/18/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 54, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 125

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Plaintiff commenced this action on December 12, 2018 against Craig Weiss (Weiss), Morton-Barrow Owners Corp. (MBOC), Wells Fargo Bank, N.A. (Wells Fargo), and Margaret Baisley (Baisley) alleging six causes of action (NY St Cts Elec Filing [NYSCEF] Doc No. 84). Currently, plaintiff moves under CPLR § 3025 (b) for leave to file an amended complaint to add and modify factual allegations and to add a seventh cause of action (*see* NYSCEF Doc No. 81, notice of motion).[1] Plaintiff also seeks to amend the caption to remove Baisley, against whom all causes of action have been dismissed (*see* NYSCEF Doc No. 54, judgment entered December 11, 2020). Wells Fargo opposes the motion (NYSCEF Doc Nos. 95 to 117). MBOC also opposes the motion, adopting Wells Fargo's arguments (NYSCEF Doc No. 119). In addition to Baisley, Weiss,

[1] From plaintiff's counsel's affirmation and a comparison of the complaints, it appears that the proposed complaint adds a cause of action for a declaratory judgment along with related factual allegations (*see* NYSCEF Doc No. 89 at ¶¶ 37 to 41). Additionally, plaintiff seeks to add and modify some of the allegations from paragraphs 1 to 21 of the original complaint, though the motion does not address this.

who allegedly is in default, has not responded to the motion. The court denies plaintiff's motion for the reasons below.

Background

According to the original complaint, Weiss is the purported proprietary lessee and shareholder of unit 6F at 87 Barrow Street in Manhattan, MBOC is the proprietary lessor, Wells Fargo purportedly is the mortgagee and holder of a lien on the unit, and Baisley is MBOC's attorney. Underlying the complaint is the allegation that Weiss agreed to transfer the proprietary lease and stock to plaintiff after the court in a prior action granted plaintiff an order of attachment against Weiss's lease and stock to secure the sum of $723,231.12 (*see* NYSCEF Doc No. 100 at 5-6, *144 Sullivan Street Equities, Inc. v the Room Inc. et al.* [Sup Ct, NY County, September 17, 2015, Jaffe, J., Index No. 150119/15]). This allegation directly relates to two others: first, the lease and stock were loan collateral pledged to Wells Fargo; and second, there allegedly was a nonpayment proceeding in Civil Court, New York County, in which the court granted MBOC a default judgment and warrant of eviction against Weiss.

The complaint asserts that plaintiff made a good faith payment to MBOC for $23,319.83 to stop the eviction and made an agreement with MBOC to purchase the apartment. Relatedly, the complaint asserts that plaintiff made an agreement with Wells Fargo to accept a reduced sum in satisfaction of Weiss's loan, reimburse plaintiff for its $23,319.83 payment to MBOC, and credit any outstanding maintenance fees. The complaint further asserts that Wells Fargo provided the lease and stock to Baisley in contemplation of the sale, but no closing occurred as MBOC and Wells Fargo breached their agreements with plaintiff. Specifically, MBOC demanded payment for legal expenses and past due maintenance fees and Wells Fargo refused to accept the previously agreed sum to satisfy its lien, reimburse plaintiff for its payment to MBOC, and pay MBOC for

the maintenance fees. The complaint further alleges that Baisley returned the lease and stock to Wells Fargo in violation of the attachment order. The complaint asserts six causes of action: (1) specific performance against Wells Fargo and MBOC to compel the apartment's sale to plaintiff, remedying defendants' breach of contract;[2] (2) detrimental reliance against each defendant based on their wrongful conduct; (3) unjust enrichment against Wells Fargo and MBOC as they obtained a benefit from plaintiff's payment of $23,319.83; (4) breach of fiduciary obligation against Baisley for her return of the stock and lease to Wells Fargo; (5) tortious interference against MBOC and Baisley for impeding plaintiff's transaction with Wells Fargo; and (6) attorney's fees against each defendant. As stated, the court orders the dismissal of the above claims to the extent that they were asserted against Baisley.

After plaintiff served the complaint, motion practice and extensions of the time to answer followed. The court's preliminary conference order, dated May 24, 2021, set the discovery schedule and the note of issue filing deadline as August 25, 2021 (NYSCEF Doc No. 102). Plaintiff filed a consent to change attorney form on September 16, 2022 and the instant motion on September 18, 2022 (NYSCEF Doc Nos. 112 and 81, respectively). After five extensions of the filing deadline (NYSCEF Doc Nos. 104 to 107 and 111), plaintiff filed the note of issue on October 13, 2022 (NYSCEF Doc No. 115). The parties then stipulated to vacate the note of issue on October 25, 2022 (NYSCEF Doc No. 116) based on the pending motion.

The Proposed Amended Complaint

The proposed cause of action for declaratory relief is premised on the following allegations. In discovery, plaintiff allegedly learned of significant defects in the purported loan that Wells

[2] "[S]pecific performance is an equitable remedy for a breach of contract, rather than a separate cause of action" (*Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc.*, 112 AD3d 78, 86 [1st Dept 2013] [internal quotation marks and citation omitted]).

Fargo claims to hold. Weiss, the shareholder, did not sign the promissory note; instead, Margaret M. Dennis, who is not recorded as having power of attorney, signed it as an attorney in fact. According to plaintiff this renders the note invalid and unenforceable (*see* Real Property Law § 421). Plaintiff asserts upon information and belief that Wells Fargo does not possess the original note and therefore lacks standing to enforce it. Similarly, plaintiff asserts upon information and belief that the allonges contain defects and therefore Wells Fargo lacks standing or authority, or both, to sue to enforce the note. Plaintiff also asserts upon information and belief that the note is unenforceable under the statute of limitations. And further, plaintiff alleges that a Uniform Commercial Code financing statement (UCC-1 financing statement) was filed approximately one month before the note was signed, and "[a]n actual controversy exists between the parties in that upon information and belief, [Wells Fargo] has taken the position that the [l]oan is a superior lien upon the [p]roperty over plaintiff's lien on the [p]roperty" (NYSCEF Doc No. 89 at ¶ 39).

Based upon these allegations, plaintiff's proposed seventh cause of action seeks a declaration that the loan is defective and that the loan and all UCC-1 financing statements related to the loan are null and void. To this end, the complaint asserts that "[p]laintiff has no other adequate remedy at law" (*id.* at ¶ 41).

Arguments

In its motion, plaintiff contends an amended complaint is necessary because recent discovery revealed defects in the note, and the depositions raised issues as to whether Wells Fargo possesses the original note and proper allonges. Plaintiff further contends that there is no prejudice to Wells Fargo as the bank was aware of these issues months before they became evident in discovery.

In opposition, Wells Fargo first argues that the new claim is a surprise and prejudicial as the new claim will require discovery on new issues, which will cause unwarranted delay and expense in this long-pending action. According to Wells Fargo, the proposed claim directly contradicts the original complaint's aim to enforce an agreement in which plaintiff pays a reduced sum to Wells Fargo in exchange for Wells Fargo's relinquishment of its lien. In this regard, Wells Fargo emphasizes that it conducted discovery and prepared defenses to challenge the specific allegations and causes of action pled in the original complaint. It also emphasizes that the discovery period was extended numerous times.

Second, Wells Fargo asserts that plaintiff made a vague and unsupported statement about discovery and has no reasonable excuse for its delay in moving to amend. For example, Wells Fargo claims that plaintiff does not explain its delay in seeking publicly available information on the lien as records pertaining to the note and allonge were available on New York City's Automated City Register Information System (ACRIS) in 2008 and 2013, respectively. Even if the records were not publicly available, Wells Fargo avers that plaintiff received them in March 2022, approximately six months before most fact discovery ended. Wells Fargo questions plaintiff's failure to explain the six-month delay between the receipt of the records and the filing of the instant motion. Noting this motion's filing coincided with plaintiff retaining a new attorney, Wells Fargo asserts that the change in counsel is not a basis for a new theory at this point in the litigation.

Third, Wells Fargo argues that the new cause of action has no merit in fact or law as it challenges Wells Fargo's standing to foreclose on the collateral for the note, the 87 Barrow Street apartment. Wells Fargo contends that it has standing due to its perfected security interest. In addition, it contends that standing becomes relevant only if it commences a foreclosure action and

Weiss raises standing defenses. Wells Fargo stresses that if the court determines that a creditor such as itself lacks standing to enforce a note in a foreclosure action, the creditor has an opportunity to cure the standing issue. In Wells Fargo's view, there is no actual controversy because there is no pending foreclosure action, and thus the alleged issues with the note and the allonge are irrelevant. From this, Wells Fargo asserts that plaintiff is seeking an advisory opinion which the court cannot issue. Wells Fargo relies upon *U.S. Bank N.A. v McCaffery* (186 AD3d 897, 899 [2d Dept 2020], quoting *Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354 [1988]) as it holds that "[t]he courts of New York do not issue advisory opinions" (*see* NYSCEF Doc No. 117, mem of law at 14). Stated differently, Wells Fargo's view is that plaintiff's claim for declaratory relief "is not premised on any actual basis for changing the priority of existing liens" and "could not result in...invalidating Wells Fargo's lien or changing [p]laintiff's priority position" (NYSCEF Doc No. 117 at 14).

In reply, plaintiff contends that Wells Fargo's claimed surprise and prejudice argument is implausible as it is a sophisticated lender represented by an established law firm, and both must have reviewed the purported note and known of its deficiencies some time before the motion (NYSCEF Doc No. 120). Although plaintiff concedes that Wells Fargo provided it with a copy of the purported note on March 22, 2022, plaintiff argues that it had been unable to obtain the purported note and allonge in a lien search. It attests that ACRIS records security instruments and neither a note nor an allonge qualifies. Plaintiff further attributes the delay to the Covid-19 pandemic and the timing of its deposition of a Wells Fargo employee named Tonya Alace Johnson. Specifically, plaintiff avers that it first had access to the Johnson deposition transcript on July 28, 2022 and it served post-deposition discovery demands - in response to that testimony - on September 14, 2022.

Apart from this, plaintiff argues that because Wells Fargo asserts that it could possibly cure the unrecorded power of attorney, it admits the defect's existence and provides a basis for the court to grant the motion. Plaintiff similarly argues that the court should grant the motion as Wells Fargo did not contest the new allegations contained in the proposed complaint. As for the rest of the reply, plaintiff uses it to raise a new argument in support of its motion and a new basis for relief. The court does not consider the new argument or the additional ground for relief, as "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]; *see Srivatsa v Rosetta Holdings LLC*, 213 AD3d 514, 515-516 [1st Dept 2023]).

Legal Analysis

CPLR § 3025 (b) provides that "[a] party may amend his or her pleading...at any time by leave of court." A court will grant leave "in the absence of prejudice or surprise so long as the proposed amendment is not palpably insufficient as a matter of law" (*Mashinsky v Drescher*, 188 AD3d 465, 466 [1st Dept 2020]). A court will not deem lateness dispositive unless the other side incurs significant prejudice (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]). This prejudice is incurred when "defendant[s] ha[ve] been hindered in the preparation of [their] case or ha[ve] been prevented from taking some measure in support of [their] position" (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007] [citation omitted]).

Here, Wells Fargo, the claimed holder of the promissory note, certainly must have been "aware, at least since the action's inception, of the factual basis for the claims set forth in the proposed amendment" (*Greenburgh Eleven Union Free School Dist. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 298 AD2d 180, 181 [1st Dept 2002]). As such, defendants have not

established "prejudice beyond the purported need for additional discovery, which is insufficient" (*Shareholder Representative Servs. LLC v NASDAQ OMX Group, Inc.*, 176 AD3d 632, 633 [1st Dept 2019]). Thus, it is not dispositive that plaintiff had knowledge of the alleged facts and additional theory at least a few months before its CPLR § 3025 (b) motion.

Still, it is plaintiff's burden to "show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*Cruz v Brown,* 129 AD3d 455, 456 [1st Dept 2015] [internal quotation marks and citation omitted]). "An amendment is devoid of merit where the allegations are legally insufficient" (*Reyes v BSP Realty Corp,* 171 AD3d 504, 504 [1st Dept 2019]). Significant here is that "[d]eclaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy" (*Thome v Alexander & Louisa Calder Found.,* 70 AD3d 88, 99 [1st Dept 2009]; *see* CPLR § 3001). This means there must be "an actual controversy between genuine disputants with a stake in the outcome" and that the relief sought is not an advisory opinion (*Long Is. Light. Co. v Allianz Underwriters Ins. Co.,* 35 AD3d 253, 253 [1st Dept 2006] [internal quotation marks and citations omitted]). Rather, the relief should "serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations" (*Thome*, 70 AD3d at 99 [internal quotation marks and citation omitted]).

An instructive decision is *Fairhaven Props. v Garden City Plaza* (119 AD2d 796, 796 [2d Dept 1986]) as it affirmed the dismissal of "an action for a judgment declaring that certain liens are subordinate to the plaintiff's mortgage." The court explained that "[u]ntil there is a declared default and the commencement of foreclosure proceedings, there is no justiciable controversy" (*id.*). The court further explained that "[i]f foreclosure does occur, there will be time to litigate the priority of liens on the property" (*id.*). Plaintiff has not alleged that a foreclosure action was

commenced or is anticipated. Therefore, plaintiff's proposed amended complaint does not allege a justiciable controversy with respect to the liens in this action or otherwise state a legitimate purpose that would be served by the court issuing a declaratory judgment at this juncture. Plaintiff did not challenge Wells Fargo's assertion that the standing issue belongs to Weiss as a defense in a foreclosure action. In fact, absent from the reply is any rebuttal of Wells Fargo's contention that plaintiff is seeking an advisory opinion. Also, although plaintiff pled that it has no adequate remedy at law other than declaratory relief, plaintiff's original complaint contains other causes of action.

Accordingly, it is

ORDERED that the motion is denied except that the request for amendment of the caption to remove the party, Margaret Baisley, Esq., is granted; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision and order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the amended caption; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "e-filing" page on the court's website); and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision and order upon defendants with notice of entry; and it is further

ORDERED that plaintiff shall file a new note of issue within 60 days of entry of this court's decision and order pursuant to the parties' stipulation to vacate the note of issue, which the court so-ordered simultaneously with this decision and order.

This constitutes the decision and order of the court.

7/2/2024
DATE

HON. LESLIE A. STROTH
J.S.C.

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