

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

RSS WFCM2018-C44 - NY LOD, LLC,

Plaintiff,

v.

1442 LEXINGTON OPERATING DE LLC, AFSHIN  
HEDVAT and DANIEL RAHMANI,

Defendants.

Civil Action File No.  
21-cv-04424-DLC

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S  
MOTION FOR AMENDMENT OF THE COMPLAINT AND OTHER RELIEF**

**HOLLAND & KNIGHT LLP**

Keith M. Brandofino, Esq.

David V. Mignardi, Esq.

Attorneys for Plaintiff

*RSS WFCM2018-C44 - NY LOD, LLC*

787 Seventh Avenue

New York, New York 10019

(212) 513-3200

keith.brandofino@hklaw.com

david.mignardi@hklaw.com

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**PRELIMINARY STATEMENT**

Plaintiff<sup>1</sup> respectfully submits this memorandum of law in support of its motion for an Order: (a) pursuant to Fed. R. Civ. P. 15(a)(2), granting Plaintiff leave to file the Proposed FAC annexed to the Mignardi Decl. as Exhibit A; (b) pursuant to RPAPL § 1355(a), confirming the Referee’s Report of Sale; (c) upon amendment of the Complaint, pursuant to RPAPL § 1371(a), entering a deficiency judgment as against Defendants upon this Court’s latter adjudication of the extent of their personal liability or, in the alternative, tolling the time period by which Plaintiff must seek a deficiency judgment against Defendants until issue has been joined on the amended claims; and (d) granting such other and further relief as this Court deems just, proper, and equitable (the “Motion”).

In addition to Borrower’s defaults in its payment obligations that gave rise to the underlying foreclosure action, Defendants have also engaged in conduct that triggered their recourse liability for the deficiency that results from the foreclosure sale of the mortgaged property. Specifically, Defendants bizarrely, yet, strategically chose to initiate, maintain and prosecute the Appeal, despite the fact that the Summary Judgment Order was clearly not a final, appealable judgment within the meaning of 28 U.S.C.A. § 1291. In making a “request for judicial intervention” which was clearly “unwarranted”, Defendants committed certain conduct that the subject loan agreement (the “Loan Agreement”) and the subject guaranty (the “Guaranty” and, together with the Loan Agreement and all documents executed in connection therewith, the “Loan Documents”) prescribe as a trigger of recourse liability to them. Accordingly, Plaintiff respectfully submits that the allegations concerning Defendants’ conduct satisfies these exculpatory provisions

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<sup>1</sup> Capitalized terms not otherwise defined herein shall have the same meaning as ascribed in the Declaration of David V. Mignardi, Esq. in Support of Plaintiff’s Motion for Amendment of the Complaint and Other Relief, dated February 6, 2025 and filed herewith (“Mignardi Decl.”).

of the Loan Documents is certainly colorable and not frivolous, the proposed amendment is not futile.

Further, and because Plaintiff's claim for a deficiency judgment against Borrower and Count V of the Complaint have been severed up until the December 2, 2024 Sale Date, Plaintiff's request for this amendment was certainly not unduly delayed and cannot be said to cause undue prejudice to Defendants. Finally, as Defendants' own conduct has ostensibly triggered their own full recourse liability, Plaintiff does not seek to amend the Complaint in bad faith. As such, this Court should grant Plaintiff leave to amend the Complaint, which leave ought to be freely given.

Not only is Plaintiff entitled to the requested amendment, Plaintiff is also entitled to confirmation of the Referee's Report of Sale and entry of a deficiency judgment, in an amount to be determined. However, Plaintiff recognizes that Defendants will be afforded an opportunity to defend the claims asserted in the Amended Complaint. As a result, it is respectfully requested that the Court alternatively issue an order tolling the time period by which Plaintiff must seek a deficiency judgment against Defendants under RPAPL § 1371(a) until issue has been joined on the amended claims.

For the reasons more fully set forth below, Plaintiff respectfully submits that granting Plaintiff's request for leave herein, is the more appropriate and more economic approach, and thus respectfully requests that this Court grant this Motion in its entirety.

**FACTUAL AND PROCEDURAL BACKGROUND**

The facts and procedural background relevant to the instant Motion is fully set forth in the Mignardi Decl. that Plaintiff submits herewith, and the documents annexed thereto, and therefore, respectfully will not be repeated herein.

**ARGUMENT**

**POINT I**

**THIS COURT SHOULD GRANT THE BRANCH OF THE INSTANT MOTION SEEKING AMENDMENT OF THE COMPLAINT**

The Federal Rules provide that courts ‘should freely give leave [to amend] when justice so requires.’ Indeed, ‘[i]n the absence of any apparent or declared reason ... such as undue delay, bad faith or dilatory motive on the part of the movant ... [or] undue prejudice to the opposing party by virtue of allowance of the amendment ... the leave sought should, as the rules require, be ‘freely given.’

*Kroshnyu v. U.S. Pack Courier Servs., Inc.*, 771 F.3d 93, 109 (2d Cir. 2014) (citations omitted).

“Although Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend ‘shall be freely given when justice so requires,’ it is within the sound discretion of the district court to grant or deny leave to amend.” *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007) (citations omitted). “In exercising its discretion, the district court is required to heed the command of Rule 15(a) to grant leave to amend ‘freely ... when justice so requires.’” *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993) (citations omitted). In turn, “[o]utright refusal to grant the leave without any justifying reason for the denial is an abuse of discretion” (*Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 101 (2d Cir. 2002) (quotations omitted)), that is “inconsistent with the spirit of the Federal Rules” (*Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962)) (“[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.”).

An opponent may defeat a request for amendment of a pleading if it bears the heavy burden of establishing that the proposed amendment is futile. *See Cummings-Fowler v. Suffolk Community Coll.*, 282 F.R.D. 292, 296 (E.D.N.Y. 2012) (citations omitted). A proposed amendment “is futile if the proposed claim could not withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).”

*Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 258 (2d Cir. 2002); *see also Sumitomo Elec. Research Triangle, Inc. v. Corning Glass Works*, 109 F.R.D. 627, 628 (S.D.N.Y. 1986) (to be granted, the proposed amendment need only be “colorable and not frivolous”).

Here, the proposed amendment reflected in the Proposed FAC is very limited, consisting primarily of additional allegations concerning conduct committed by Guarantors after commencement of and during the course of these proceedings, conduct which Plaintiff submits has triggered full recourse liability to Borrower and Guarantors under Section 11.22(11) of the Loan Agreement and Section 1.2(b)(11) of the Guaranty, respectively. *See* Mignardi Decl., Ex. A, C. As the Second Circuit clearly found itself to be without the requisite appellate jurisdiction to even hear the Appeal (*id.*, Ex. G), Plaintiff’s allegation that the Appeal constituted an “unwarranted” “request for judicial intervention” is certainly “colorable and not frivolous” (*Sumitomo Elec. Research Triangle, Inc.* 109 F.R.D. at 628). In turn, if subjected to a pre-answer motion to dismiss, the filing of such motion would entitle Plaintiff to “all reasonable inferences in [its] favor[.]” (*Interworks Systems Inc. v. Merchant Financial Corp.*, 604 F.3d 692, 699 (2d Cir.2010) (citations omitted) and, thereupon, the proposed FAC would survive (*see Lucente*, 310 F.3d at 258)). Accordingly, and as Plaintiff ought to be afforded the opportunity to test its theory of Defendants’ personal liability (*see Foman*, 371 U.S. at 182), the proposed amendment reflected in the Proposed FAC is not futile (*see Cummings-Fowler*, 282 F.R.D. at 296).

Similarly, none of the common equitable grounds, such as undue delay, bad faith or dilatory motive, or undue prejudice to Defendants, can serve as a basis to deny Plaintiff its requested leave to amend. *See Kroshnyu*, 771 F.3d at 109. Indeed, this Court’s prior severance of Plaintiff’s request for a deficiency judgment against Borrower and Count V of the Complaint against Guarantors precluded Plaintiff from even seeking the within requested amendment until such time

that the Property was sold, which only occurred on the December 2, 2024 Sale Date. *See* Mignardi Decl., Ex. E, J. As Plaintiff sought this amendment approximately two months after the expiration of this severance, Defendants cannot possibly claim that Plaintiff delayed, in an undue manner, in making this amendment request. *See Kroshnyu*, 771 F.3d at 109. In addition, and because Plaintiff seeks this relief before this Court has even begun adjudication of Defendants' personal liability, Defendants cannot claim that the proposed amendment reflected in the Proposed FAC would cause them undue prejudice. *Id.*

Finally, and perhaps most importantly, Defendants' own conduct is the impetus of the within requested amendment. Defendants' commencement, maintenance and prosecution of the frivolous and meritless Appeal prolonged this litigation, delaying the ultimate exercise of Plaintiff's contractual remedies under the Loan Documents for years. Ostensibly, this conduct meets the contractual language negotiated by Defendants and Plaintiff's predecessor-in-interest (i.e., in being an "unwarranted" "request for judicial intervention") therein and, thus, Plaintiff submits this conduct has triggered grounds for full recourse liability to them. Therefore, this Court should similarly reject any claim of bad faith made by Defendants in opposition to this Motion. *Id.*

As neither futility nor any equitable grounds should deny Plaintiff the leave to amend its pleading that ought to be freely granted (*id.*; *see also Ruffolo*, 987 F.2d at 131), this Court should grant the branch of this Motion seeking amendment of the Complaint in its entirety.

**POINT II**  
**THIS COURT SHOULD GRANT THE BRANCHES**  
**OF THE INSTANT MOTION SEEKING CONFIRMATION OF THE**  
**REPORT OF SALE AND ENTRY OF A DEFICIENCY JUDGMENT**

It is well-settled that Guarantors are liable for any deficiency where security for a loan is sold through foreclosure:

if a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds[.]

*See* RPAPL § 1371(1); *see also* *First Nat'l Bank of Scotia v. Proem-A-Net Econ. Corp.*, 235 A.D.2d 753, 756, (3d Dep't 1997) (“[Guarantor’s] liability for the deficiency judgment . . . must also be affirmed. The language of the guarantee coupled with the judgment's authorization of a deficiency against him, to which no objection regarding service was raised, supports recovery.” (footnote omitted) (citation omitted)); *MBL Life Assurance Corp. v. 555 Realty Co.*, 240 A.D.2d 377, 377 (2d Dep't 1997) (“[P]laintiff would be entitled to seek a deficiency judgment in the event that the defendants were held liable for it.” (citation omitted)).

This Court is expressly authorized to the grant the deficiency where, as here, Plaintiff brings this motion simultaneously with its motion seeking confirmation of the Sale:

Simultaneously with the making of a motion for an order confirming the sale, provided such motion is made within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment.

*See M&T Real Estate Tr. v. Doyle*, 20 N.Y.3d 563, 565 (2013) (*quoting* RPAPL § 1371(2)).

In determining the amount of the deficiency judgment, the Court is charged with determining the remaining amounts due and owing under the loan after applying, as a credit, the result of the foreclosure sale. *See Flushing Sav. Bank, FSB v. Bitar*, 106 A.D.3d 690 (2d Dep't 2013) (“RPAPL § 1371(2) permits the mortgagee in a mortgage foreclosure action to recover a deficiency judgment for the difference between the amount of indebtedness on the mortgage and either the auction price at the foreclosure sale or the fair market value of the property, whichever is higher.” (citations omitted)).

As set forth in the Report of Sale, the Referee has computed \$19,651,301.05 as the amount due and owing under the Loan Documents. *See* Mignardi Decl., Ex. J. At the Sale, Plaintiff acquired the Property with a \$19,200,000.00 winning bid. *Id.* However, Plaintiff respectfully submits that this Court's adjudication of the extent of Defendants personal liability, if any, should occur after its adjudication of the branch of this Motion seeking amendment and, if amendment is granted, upon Defendants' interposition of any defenses to Plaintiffs' asserted grounds of their personal liability. Indeed, Plaintiff submits that discovery and/or motion practice will illuminate grounds that exist for this Court to use the fair market value of the Property at the time of the Sale, \$8,800,000.00, rather than the Sale Price, \$19,200,000.00, as the variable for determination of the amount of the deficiency. Regardless, while Defendants will and should be afforded the opportunity to file their responsive pleading to the Proposed Amended Complaint, if this Court grants Plaintiff leave to file same, Defendants will ultimately not be able to dispute that, regardless of whichever variable this Court uses, the fact remains that the public auction of the Property did, in fact, yield a deficiency. *See Flushing Sav. Bank, FSB.*

Although the extent of Defendants' personal liability of the deficiency is not yet ripe for adjudication, this Court should nevertheless confirm the Referee's Report of Sale and make the Sale absolute and binding forever pursuant to RPAPL § 1355. Further, this Court should enter a deficiency judgment as against Defendants, in an amount to be determined, pursuant to RPAPL § 1371(2) or, in the alternative, toll the time period by which Plaintiff must seek a deficiency judgment against Defendants until issue has been joined on the amended claims.

**CONCLUSION**

For the foregoing reasons, Plaintiff respectfully requests that the Court grant this Motion in its entirety.

Dated: New York, New York  
February 6, 2025

**HOLLAND & KNIGHT LLP**

By: /s/ David V. Mignardi  
Keith M. Brandofino, Esq.  
David V. Mignardi, Esq.  
*Attorneys for Plaintiff*  
*RSS WFCM2018-C44 - NY LOD, LLC*  
787 Seventh Avenue  
New York, New York 10019  
(212) 513-3200  
keith.brandofino@hklaw.com  
david.mignardi@hklaw.com

**CERTIFICATION OF COMPLIANCE**

Pursuant to Rule II(D) of the Individual Practices of Judge Denise L. Cote, I certify that the total number of words in this memorandum of law, excluding the caption, table of contents, table of authorities, and certification of compliance is 2,214.

*/s/ David V. Mignardi*

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DAVID V. MIGNARDI