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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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GREYSTONE BANK,

Plaintiff,

-against-

**TRIAL/IAS PART: 22
NASSAU COUNTY**

Index No: 007223-10

**Motion Seq. Nos. 1 & 2
Submission Date: 8/9/10**

**15 HOOVER STREET, LLC, a New York
Limited Liability Company, DAVID
NEUBERG, an individual MALKIE
NEUBERG, an individual, IAN S.
RUBENSTEIN, an individual, MY NEW
YORK PROPERTIES LLC, a New York
Limited Liability Company, BEST
DEVELOPMENT CONSULTING LLC, a
New York Limited Liability Company,
KARAT PLATINUM LLC, a New York
Limited Liability Company, A & B
ENTERPRISES USA, INC., a New York
corporation, UNITEX CARGO SERVICES,
INC., a New York Corporation, DESIGN FOR
LIVING, LLC, a New York Limited Liability
Company, PLATINUM GEM CORP., a New
York corporation, ZEE COURIER
CORPORATION, a New York corporation,
ATLANTIC FEATHER & FOAM, INC., a
New York corporation, and "John Doe #1" to
"John Doe #50", Both Inclusive, the Names of
the Last 50 Defendants, Being Fictitious, Said
Defendants' True Names Being Thereby
Intended to Designate Parties with Liens that
are Subject and Subordinate to the Lien of the
Mortgage Being foreclosed herein and Tenants,
Lessees, or Occupants of Portions of the
Mortgaged Premises Described in the
Complaint,**

Defendants.
-----x

The following papers having been read on these motions:

**Notice of Motion, Affirmation in Support,
Affidavits in Support (2) and Exhibits.....X
Memorandum of Law in Support.....X
Notice of Cross Motion, Affirmation and Exhibits.....X
Affirmation in Opposition and Exhibits.....X
Memorandum of Law in Opposition.....X
Reply Affidavit of E. Neuberg.....X
Defendants' Reply Memorandum of Law in Support.....X
Reply Affidavit of I. Rubinstein.....X
Reply Affirmation.....X**

This matter is before the Court for decision on 1) the motion filed by Defendants David Neuberg, Malkie Neuberg, My New York Properties LLC, Karat Platinum LLC and Best Development Consulting LLC on July 7, 2010, and 2) the cross motion filed by Defendants 15 Hoover LLC and Ian Rubinstein on July 9, 2010, both of which were submitted on August 9, 2010. For the reasons set forth below, the Court 1) grants the motion and cross motion to the to the extent that the Court hereby stays Plaintiff's prosecution of the deficiency judgment on the note pending resolution of the foreclosure action and further order of the court; and 2) otherwise denies the motion and cross motion.

BACKGROUND

A. Relief Sought

Defendants David Neuberg, Malkie Neuberg, My New York Properties LLC, Karat Platinum LLC and Best Development Consulting LLC move for an Order, 1) pursuant to Banking Law § 200, Business Corporation Law ("BCL") § 1312 and CPLR § 3211(a), dismissing or staying this action on the ground that Plaintiff Greystone Bank ("Plaintiff") is not duly licensed or authorized to do business in the State of New York ("New York"); and 2) pursuant to CPLR § 3211(a) and Real Property Actions and Proceedings Law ("RPAPL") § 1301, dismissing the Amended Complaint ("Complaint") on the ground that Plaintiff was required, but failed, to elect its remedy. ¹

Defendants 15 Hoover LLC ("Hoover") and Ian Rubinstein ("Rubinstein") cross move

¹ Defendants also moved to dismiss the action against Defendant Malkie Neuberg on the ground that Plaintiff did not properly effect service of process on her. In her Affirmation in Opposition, counsel for Plaintiff provides an Affidavit of Service reflecting service of process on Malkie Neuberg, pursuant to CPLR § 308(1), on July 9, 2010. As this Affidavit resolves the issues raised by Defendants regarding the substituted service on Defendant Malkie Neuberg, the Court will not address this branch of the motion.

for an Order 1) pursuant to Banking Law § 200, BCL § 1312 and CPLR § 3211(a), dismissing or staying this action on the ground that Plaintiff is not duly licensed or authorized to do business in New York and, thus, may not maintain this action; and 2) pursuant to CPLR § 3211(a) and RPAPL § 1301, dismissing the Complaint on the ground that Defendant was required, but failed, to elect its remedy.²

Plaintiff opposes the motion and cross motion.

B. The Parties' History

In the Complaint (Ex. A to motion), Plaintiff alleges as follows:

This is an action 1) to foreclose on a first mortgage lien on certain premises located in Nassau County ("Property"), 2) to enforce a guaranty ("Guaranty"), and 3) for related relief.

Plaintiff is the owner and holder of the subject first mortgage lien on the Property. Plaintiff is a North Carolina corporation with its principal place of business in North Carolina. Plaintiff maintains a branch in New York.

Hoover, a New York limited liability company, is the mortgagor of the first mortgage lien on the Property, and a maker of the note ("Note") secured by the mortgage lien. David and Malkie Neuberger ("Neuberger") are makers of the Note. Hoover and the Neuberger are referred to collectively as the "Borrowers." Rubinstein is the guarantor of the Borrowers' obligations under the Note and mortgage ("Mortgage"), pursuant to the Guaranty that he executed.

Defendants My New York Properties, LLC ("New York Properties"), Best Development Consulting, LLC ("BDC"), Karat Platinum LLC ("Karat"), A & B Enterprises USA, Inc. ("A & B"), Unitex Cargo Services, Inc. ("Unitex"), Design for Living, LLC ("Design"), Platinum Gem Corp. ("Platinum"), Zee Courier Corporation ("Zee") and Atlantic Feather & Foam, Inc. ("Atlantic") are lessees of a portion of the Property.

The Complaint alleges that Borrowers failed to make required payments pursuant to the Note and Mortgage and are thereby in default. In the Complaint, Plaintiff asserts six causes of action: (1) foreclosure and sale of the Property that secures the loan, (2) foreclosure of Greystone's security interest in personal property, (3) recovery of rental proceeds pursuant to an assignment of leases and rents, (4) possession of the Property, (5) a deficiency judgment against

² The Notice of Cross Motion states that Defendants Hoover and Rubinstein move to dismiss the Complaint on the grounds that "Defendant 15 Hoover, LLC" is not licensed to do business in New York, and failed to elect its remedy. The Court concludes that this was a typographical error, and that these Defendants are alleging that Plaintiff may not maintain this action.

Borrowers for any deficiency due to Greystone following foreclosure and sale of the Property, and (6) a money judgment against Guarantor Ian Rubinstein for any deficiency due to Greystone following foreclosure and sale of the Property.

While Greystone does not maintain a branch office in New York, Greystone submits that it does have a “domestic representative office” in New York. In support, Plaintiff provides copies of relevant pages from the New York State Banking Department website (Ex. B to Aff. in Opp.) reflecting 1) that Plaintiff is listed on a document titled “Institutions We Supervise - Domestic Out of State Representative Offices - As of June 30, 2010;” and 2) the Supervisory Policy for the registration of Domestic Representative Offices.

Section 8.2 of the New York Banking Department’s Supervisory Policy provides the following definitions:

(a) *Banking institution* means any bank, trust company, savings bank, and savings and loan association chartered under the laws of New York State, Puerto Rico or any other state or territory of the United States.

(b) *Representative office* means any office located in this State of a banking institution that engaged in representational functions (including but not limited to soliciting business, marketing services or acting as liaison with customers) on behalf of the banking institution, but shall not include a branch office of a banking institution or any office that engages solely in administrative or supervisory functions. A representative office shall also include an office of a New York chartered institution located outside this State that engages in representational functions.

Defendants submitted Reply Affidavits of Eli Neuberg and Ian Rubinstein. In his Reply Affidavit, Eli Neuberg affirms, in pertinent part, as follows:

I am a member of My New York Properties LLC, a Defendant in the above-captioned action.

* * *

From mid-2008 through the present, I have engaged in numerous meetings, phone conversations and correspondence with representatives of Greystone Bank in New York in connection with a loan to 15 Hoover Street , LLC and other potential business transactions.

At no time did any representative of Greystone Bank, or any sign, notice or promotional material of Greystone Bank of which I am aware, state that Greystone Bank’s office at 152 West 57th Street, New York, New York or elsewhere in this state was a representative office.

In his Reply Affidavit, Ian Rubinstein affirms that:

In early February I was in direct contact with Greystone Bank ("Bank") in a effort to work out past due monies owed on the Mortgage in question. My communications with the Bank was [sic] on the Phone and by e-mail. The two individuals that I dealt with were James Lieblich and Bob Boralak. As part of my e-mail communications with Mr. Lieblich the "signature" at the conclusions of his e-mails appeared as

Best regards.

Jim

James K. Lieblich
Greystone Bank
152 West 57th Street
New York, NY 10019
(212) 649-9738
jl Lieblich@greystonebank.com

In late February, 2010 I and Mr. Neuberg [sic] met with Bob Boralak, Jim Lieblich and one other person at the Greystone branch at 152 West 57th Street, New York, New York 10019 ("Branch"). The offices had a magnificent view of Central Park and the City and I commented that their customers must love to come up and do business.

* * *

At all times I was under the impression that the Greystone Bank location at 152 West 57th Street was the New York branch of Greystone Bank.

The Parties' Positions

Defendants argue that Plaintiff is not authorized to maintain this action because it is a foreign corporation that is not licensed or authorized to do business in New York. Defendants contend, further, that Plaintiff may not pursue this action in which it seeks both to foreclose on the subject mortgage and to recover from the Borrowers for payments due under the Mortgage and Note, but rather must elect which remedy it wishes to pursue.

Plaintiff submit that 1) the instant action does not violate the RPAPL, or election of remedies doctrine, because they do not prohibit actions such as this one in which Plaintiff seeks foreclosure of a mortgage and a deficiency judgment against the borrower and guarantor; and 2) Greystone, as a foreign bank with a domestic representative office, may foreclose a New York mortgage.

RULING OF THE COURT

A. Standards for Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

In addition, it is well settled that a motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

While affidavits may be considered on a motion filed pursuant to CPLR § 3211, if the motion has not been converted to a CPLR § 3212 motion for summary judgment, they are generally intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims. *Nonnon v. City of New York*, 9 N.Y.3d 825, 827 (2007).

B. Plaintiff's Right to Sue

In *Commonwealth Bank & Trust v. Tioga Mills*, 78 A.D.2d 953 (3d Dept. 1979), the Third Department affirmed the trial court's order granting summary judgment in favor of plaintiff in its action to foreclose on two mortgages. *Id.* at 953-954. The Third Department rejected defendant's argument that plaintiff, a banking corporation organized under the laws of the Commonwealth of Pennsylvania with no branch or office in New York and not authorized to transact business in New York, was precluded from maintaining the action. *Id.* at 953. The Court rejected defendant's argument that the action was precluded by designated provisions of

the BCL and Banking Law, and held that the action was specifically authorized by Section 200 of the Banking Law. *Id.* at 953-954. The final paragraph of Banking Law Section 200, which prohibits a foreign banking corporation from transacting business in New York unless certain requirements are met, provides as follows:

This section shall not be construed to prohibit foreign banking corporations which do not maintain an office in this state for the transaction of business from (1) making loans in this state secured by mortgages on real property, nor from contracting in this state with a banking institution engaged in the business of banking under the laws of this state to acquire from or through such banking institution a part interest or the entire interest in a loan or evidence of debt which such banking institution has heretofore or hereafter made, purchased or acquired, for its own account or otherwise, together with a like interest in any security and any security instrument proposed to be given or heretofore or hereafter given to secure or evidence such loan or evidence of debt; (2) enforcing in this state obligations heretofore or hereafter acquired by it in the transaction of business outside of this state, or in the transaction of any business authorized by this section; (3) acquiring, holding, leasing, mortgaging, contracting with respect to, or otherwise protecting or conveying property in this state heretofore or hereafter assigned, transferred, mortgaged or conveyed to it as security for, or in whole or part satisfaction of a loan or loans made by it or obligations acquired by it in the transaction of business outside of this state, or in the transaction of any business authorized by this section.

The Third Department, in *Commonwealth Bank, supra*, concluded that, because plaintiff had no office or branch located in New York for the purpose of transacting business, plaintiff was permitted, pursuant to Section 200 of the Banking Law, to maintain its action to enforce the obligation created by the mortgages on defendant's real property in New York given to secure loans made in New York. *Id.* at 954.

In *Banque Arabe Et International D'Investissement v. One Times Square Associates*, 193 A.D.2d 387 (1st Dept. 1993), *app. den.*, 82 N.Y.2d 654 (1993), the First Department affirmed the trial court's order denying defendant-lessee's cross motion for summary judgment dismissing the complaint and granting plaintiff's cross motion for summary judgment in its mortgage foreclosure action. *Id.* The First Department held that the mortgage foreclosure action was authorized, notwithstanding that plaintiff, a foreign banking corporation that maintained a representative office in New York, although properly registered, was unlicensed. *Id.*, citing, *inter alia*, Banking Law § 200(4). And in *First Wisconsin Trust Company v. Hakimian*, 237 A.D.2d 249 (2d Dept. 1997), the Second Department, affirming the trial court's denial of defendants' motion to vacate the judgment in favor of plaintiff in a foreclosure action, held that

“[c]ontrary to the appellants’ contentions, First Wisconsin was authorized to commence this mortgage foreclosure action. First Wisconsin is a foreign bank which is not licensed in New York State. Banking Law § 200 authorizes foreign banks to loan money secured by mortgages on property in this State and to commence actions to enforce obligations under those mortgages.” *Id.* at 250, citing, *inter alia*, *Banque Arabe et International*, *supra*.

C. Election of Remedies

The holder of a mortgage in default has two alternative remedies: 1) at law to recover on the obligation, and 2) in equity, to foreclose its lien against the property mortgage. *Copp v. Sands Point Marina*, 17 N.Y.2d 291 (1996).

RPAPL § 1301(1) provides that when “final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued upon the judgment to the sheriff . . . and has been returned wholly or partly unsatisfied.” RPAPL § 1301(3) further provides that “[w]hile [a foreclosure] action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought.” The statute precludes a mortgagee who has elected foreclosure from commencing an action on the mortgage debt without leave of the court. *Marine Midland Bank NA v. Lake Huntington Development Group, Inc.*, 185 A.D.2d 395, 396 (3d Dept. 1992). *See also Brown v. Bellamy*, 170 A.D.2d 876 (3d Dept. 1991), *app. den.*, 78 N.Y.2d 853 (1991) (where bank pursued foreclosure action, its subrogee was barred from initiating action on debt without leave of court).

The legislative intention underlying RPAPL § 1301 is to avoid multiple suits to recover the same mortgage debt and confine the proceedings to collect the mortgage debt to one court and one action. *Anron Air Systems v. Columbia Sussex Corp.*, 202 A.D.2d 460, 462 (2d Dept. 1994), quoting *Dollar Dry Dock v. Piping Rock Builders, Inc.*, 181 A.D.2d 709, 710 (2d Dept. 1992). This statute is to be strictly construed because it is in derogation of a plaintiff’s common law right to pursue the alternate remedies of foreclosure and recovery of the mortgage debt at the same time. *Valley Savings Bank v. Rose*, 228 A.D.2d 666, 667 (2d Dept. 1996), quoting *Dollar Dry Dock*, *supra*, at 710. Leave should be granted to maintain a second action if

there exist special circumstances which manifestly require that course. *Dyck-O'Neal, Inc. v. Thomson*, 56 A.D.3d 1262, 1264, quoting *Sanders v. Palmer*, 68 N.Y.2d 180, 185-186 (1986).

In *Anron Air Systems, supra*, the trial court denied defendant's motion to dismiss the action, or alternatively to stay the action, on the grounds that plaintiff was prohibited from maintaining its breach of contract action while its lien foreclosure action was pending. 202 A.D.2d at 460-461. The Second Department reversed the trial court's order to the extent that it stayed the prosecution of the breach of contract action. *Id.* at 461.

D. Application of these Principles to the Instant Action

The Court concludes that Plaintiff, a foreign corporation that maintains a domestic representative office registered under the New York State Banking Department, is authorized to pursue this action.

To address the issue of Plaintiff's election of remedies, the Court grants the motion and cross-motion to the extent that the Court hereby stays Plaintiff's prosecution of a deficiency judgment based upon the Note pending the completion of the foreclosure action and further order of the court.

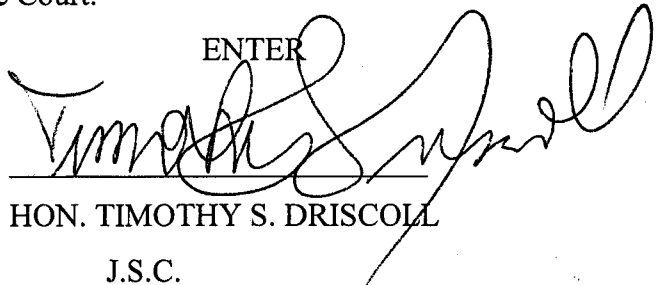
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY

September 28, 2010

ENTER


HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

SEP 30 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE