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OF THE COMMITTEE ON OPINIONS

BANK OF AMERICA NATIONAL ASSOCIATION,

Plaintiff,

v.

R.H. SURGENT, LLC; JOHN W. SURGENT; REGINA SURGENT; JPMORGAN CHASE BANK, N.A.; MONOGRAM CREDIT CARD BANK OF GEORGIA; LEXISNEXIS; STEVEN L KESSLER D/B/A LAW OFFICES OF STEVEN L. KESSLER; AND THE UNITED STATES OF AMERICA.

Defendants.

and

STEVEN L KESSLER D/B/A LAW OFFICES OF STEVEN L. KESSLER,

Counterclaim, Cross-claim, and Third-Party Plaintiff,

v.

BANK OF AMERICA NATIONAL ASSOCIATION; R.H. SURGENT, LLC; JOHN W. SURGENT; AND REGINA SURGENT,

Counterclaim, Cross-claim, and Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION: BERGEN COUNTY

DOCKET No. F-009209-17

OPINION

Argued: June 26, 2018

Decided: June 29, 2018

Appearances: William DeSantis (Ballard Spahr, attorneys) and Michael O'Donnell (Riker Danzig, attorneys) for plaintiff

Harold P. Cook, III for defendants Regina Surgent and R.H. Surgent, LLC (Harold P. Cook, III Esq. & Associates, attorneys)

John W. Surgent, defendant, *pro se*

Nicholas A. Duston for defendant Steven Kessler (Norris, McLaughlin & Marcus, attorneys)

HON. EDWARD A. JEREJIAN, J.S.C.

The instant matter is before the court by way of Plaintiff's Motion to Strike the Answers of Defendants R.H. Surgent, LLC, Regina Surgent, John Surgent, and Steven Kessler, Esq. and for Summary Judgment[1] and Motion for a Protective Order, filed on May 11, 2018 and May 22, 2018 respectively. Defendants Regina Surgent, R.H. Surgent, LLC, Steven Kessler, and John Surgent have each filed oppositions to the Motion for Summary Judgment. John Surgent has filed a separate opposition to the Motion for a Protective Order. Plaintiff's counsels, William DeSantis and Michael O'Donnell, filed separate reply briefs on June 21, 2018.

Factual Background

The subject of the instant case is a multi-million dollar property located at 320 Algonquin Road, Franklin Lakes, New Jersey (hereafter, the "Property"), the ownership interest thereof, and Plaintiff's ability to foreclose that interest. The parties and their interests are entangled and largely at odds, each asserting interest in the Property: Regina Surgent, the Purchaser of the Property (hereafter, "Regina"); R.H. Surgent, LLC (hereafter, the "LLC"), the "owner" of the Property; John Surgent, the former manager of R.H. Surgent, LLC and the husband of Regina; Plaintiff,[2] the

[1] While such motions are denominated as motions to strike contesting answer, R. 4:6-5, they are in sum and substance motions for summary judgment to be governed by the requirements of R. 4:46-2. See, e.g., Prudential Ins. Co. of Am. v. Jackson, 270 N.J. Super. 510, 519 (App. Div. 1994).

[2] Bank of America merged with the Merrill Lynch Credit Corporation, the original lender. Bank of America is considered the original lender pursuant to 12 U.S.C. § 215(e). The term Plaintiff, as used herein, shall refer to Bank of America and/or the Merrill Lynch Credit Corporation.

provider of a construction and refinancing loan now seeking to foreclose on the Property following default; and Steven Kessler, Esq., an attorney hired to shield the Property from forfeiture proceedings instituted by the United States government following John Surgent's conviction for federal crimes, now a judgment creditor.

The Property was purchased by Regina Surgent in 1988 for $1,350,000. After a brief transfer to John Surgent in July of 1995, to obtain a secured business loan from Hudson City Savings Bank in the amount of $600,000, the Property was transferred back to Regina Surgent later that month.

On August 16, 1999, R.H. Surgent, LLC was formed in the State of Nevada. Regina Surgent was identified as the manager and organizer of the LLC. On September 7, 2018, Regina transferred her interest in the Property to the LLC.

On January 10, 2000, Plaintiff issued a loan to Defendants John Surgent and the LLC (hereafter, the "Loan") to be used to refinance and perform home renovations. The Loan is evidenced by a Note dated January 10, 2000 executed by John Surgent on his own behalf and on behalf of R.H. Surgent, LLC. A Special Meeting had been held, and corporate documents filed, to make John Surgent the manager of the LLC and give him the authority to sign on the LLC's behalf. Also on January 10, 2000, R.H. Surgent, LLC gave Plaintiff a mortgage on the Property.

On April 15, 2014 John Surgent was charged with three federal crimes by the United States government (hereafter, the "Government"): securities fraud, conspiracy to commit securities fraud, and money laundering. On July 26, 2005, he was convicted of all three offenses. Pursuant to a superseding indictment filed on June 10, 2005, on August 26, 2005 the Government filed a motion for forfeiture of property. The primary subject of the forfeiture action was the Property. It proceeding was presided over by the Honorable John Gleeson, U.S.D.J. of the Eastern District of New York. Certain ancillary matters and proceedings were assigned to a Federal Magistrate Judge,

the Honorable Steven M. Gold, U.S.M.J., also of the Eastern District of New York.

In August of 2005, Regina Surgent retained Steven Kessler, Esq. to represent her in the foreclosure proceeding. In a petition filed on June 1, 2006, and in subsequent papers and arguments submitted to the federal court, Regina Surgent made arguments to oppose the forfeiture, the veracity and implications of which are now heavily disputed. In essence, Regina (and Kessler on her behalf) represented the following, in deposition testimony and submissions to that court: that the Property was solely held by R.H. Surgent, LLC, that the transfer of interest in the Property to the LLC was not fraudulent and was done for estate planning purposes, and that she was the sole interest holder in the LLC.

Default on the loan obligation occurred in February 2006, during the pendency of the forfeiture proceeding. Initially, payments on the loan were made by the bookkeeper. After John Surgent's incarceration, Regina Surgent made the mortgage payments. However, due to financial constraints, as indicated by Regina Surgent in deposition testimony, payments eventually ceased. Plaintiff sought to foreclose and filed a foreclosure complaint in February 2007 (Docket No. BER-F-004652-07 and hereafter, the "2007 Foreclosure").

A consent order was entered into between Plaintiff and the Government and was captioned in both the 2007 Foreclosure and the forfeiture action (hereafter, the "Consent Order"). The Consent Order memorialized an agreement between the Government and Plaintiff that Plaintiff had a legitimate interest in the Property, that its interest was superior to that of the Government, that the Government would forbear from divesting the interest of Plaintiff in its forfeiture action, and that Plaintiff would be permitted to proceed with the 2007 Foreclosure but would not conduct a Sheriff's Sale until further order of the court. The consent order was signed by the Honorable Robert P. Contillo, P.J.Ch. on April 14, 2008 in the 2007 Foreclosure. On April 27, 2008 the Consent Order

was "so ordered" by Judge Gleeson in the forfeiture proceeding. It should be noted that Kessler did not file any objection to the request by the U.S. attorney that Judge Gleeson "so order" the Consent Order.

Ultimately, Regina Surgent prevailed in the forfeiture proceeding. Judge Gleeson, by way of an opinion dated August 17, 2009, found that the transfer of interest from Regina Surgent to the LLC was not fraudulent and that the Government failed to demonstrate that John Surgent held any interest in the Property or the LLC.

Kessler filed suit for amounts due and owing from Regina Surgent in the Supreme Court of the State of New York (Steven L. Kessler d/b/a Law Offices of Steven L. Kessler v. Regina Surgent, Index No. 652156/12). Judgment was entered in Kessler's favor. Kessler, hired to shield and protect Regina Surgent's assets, ultimately became a judgment creditor in the amount of $622,068.71.

Eventually, the 2007 Foreclosure stalled and was dismissed for lack of prosecution.

The Property is currently occupied by Regina Surgent and John Surgent, on a part-time basis since his release from prison. The loan remains in default, with payment not being made since the initial February 2006 default. Taxes and Insurance have also not been paid by Defendants and Plaintiff has advanced $759,975.18 towards those and other expenses (that being the total as of April 10, 2018). The amount due on the loan is $3,194,302.44 (as of May 10, 2018).

Plaintiff reinstituted foreclosure proceedings by way of the Complaint filed in the above-entitled action on April 13, 2017.

The Summary Judgment Standard of Review

The purpose of summary judgment is to "avoid trials which would serve no useful purpose and to afford deserving litigants immediate relief." Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74 (1954). Summary judgment should be granted "if the pleadings, depositions, answers to

interrogatories and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." N.J.S.A. 4:46-2(c).

In order to satisfy its burden of proof on a summary judgment motion, the moving party must show that no genuine issue of material facts exists. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528–29 (1995). Once the moving party satisfies its burden, the burden then shifts to the non-moving party to present evidence there is a genuine issue for trial. Ibid. The non-moving party may not solely rely on denials or allegations made in an answer to defeat a motion for summary judgment. See Cortez v. Gindhart, 435 N.J. Super. 589, 606 (App. Div. 2014). Instead, the non-moving party must respond with affidavits meeting the requirements of R. 1:6-6 as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial.

In determining whether the existence of a genuine issue of material fact precludes summary judgment, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. Even if there is a denial of essential fact, the court should grant a motion for summary judgment if the rest of the record, viewed most favorably to the party opposing the motion, demonstrates the absence of a material and genuine factual dispute. See Rankin v. Sowinski, 119 N.J. Super. 393, 399–400 (App. Div. 1972).

The only material issues in a foreclosure proceeding are the validity of the mortgage, the amount of indebtedness, and the right of the mortgagee to foreclose on the mortgaged property. Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993); see also Thorpe v. Floremoore Corp., 20 N.J. Super. 34, 37 (App. Div. 1952) ("Since the execution, recording, and non-payment

of the mortgage was conceded, a *prima facie* right to foreclose was made out"). If the Defendant's answer fails to challenge the essential elements of the foreclosure action, plaintiff is entitled to strike Defendant's answer. Old Republic Ins. Co. v. Currie, 284 N.J. Super. 571, 574 (Ch. Div. 1995); Somerset Trust Co. v. Sternberg, 238 N.J. Super. 279, 283 (Ch. Div. 1989).

Analysis

1. The transfer of the Property from Regina Surgent to the LLC was not fraudulent

Defendant Kessler seeks a declaratory judgment that the transfer of the Property from Regina Surgent to the LLC was fraudulent. See N.J.S.A. 2A:16-52. ("All courts of record in this state . . . have power to declare rights . . . ."). That assertion is the crux of his fraudulent transfer and "Reverse Veil Piercing" claims (to be discussed below).

As an initial matter, this issue was litigated and decided by Judge Gleeson, who stated, in his decision rendered as a result of cross-motions for summary judgment filed by Regina Surgent and the Government, that he agreed with Magistrate Judge Steven Gold's determination that the "transfer [of the Property by Regina] to the LLC was not fraudulent." Judge Gleeson's Memorandum and Order, U.S. v. Surgent, No. 04-cr-364 (JG)(SMG) at *29 (E.D.N.Y. Aug. 17, 2009). Though this determination was not essential to his decision, and certainly not binding on this court, Judge Gleeson's determination is nevertheless persuasive and provides further support to this court's conclusion.

In August of 1999, the month of the transfer, Regina Surgent was indisputably the owner of the Property, interest therein have been re-conveyed to her by John Surgent after the successful acquisition of the Hudson City Savings Bank loan in July 1995 and that interest being recorded in July 1996.

On August 16, 1999 the Articles of Organization for the LLC were filed with the State of

Nevada, Office of the Secretary of State. Regina Surgent was identified as the manager and organizer of the LLC in the Articles. On September 7, 1999, Regina Surgent transferred the Property to the LLC.

Regina Surgent has repeatedly explained that her interest was transferred to the LLC for estate planning purposes. This assertion was unwaveringly made to the court in the forfeiture proceeding. It was also echoed by Kessler, who argued to the court that Regina Surgent held title to the Property for estate and financial planning purposes and because of inheritance taxes. Kessler also represented to the court, repeatedly, that the transfer could not be deemed fraudulent under New Jersey law.

Not a single shred of evidence has been presented to suggest that Regina Surgent's conveyance of her interest in the Property was fraudulent; this argument amounts to no more than a bald assertion. Mere "[b]ald assertions are not capable of . . . defeating summary judgment." Ridge at Back Brook, LLC v. Klenert, 427 N.J. Super. 90, 97-98 (App. Div. 2014). And, while *res judicata* and other forms of equitable estoppel may not apply to Kessler, the court does not look favorably or attach great weight to statements and arguments made in direct contravention of statements and arguments made in earlier judicial proceedings where no explanation for the discrepancy has been provided. Further, this court's consideration of Regina Surgent and Kessler's prior statements and arguments is permitted, and appropriate, under New Jersey Rule of Evidence § 803(b), Statement by Party Opponent.

Ultimately, this court draws the same conclusion as Judge Gleeson and Magistrate Judge Gold, that the transfer of interest in the Property from Regina Surgent to the LLC was not fraudulent.

2. The mortgage held by Plaintiff is valid

Defendants each contend that the mortgage held by Plaintiff is invalid. The court disagrees.

As outlined above, Plaintiff's mortgage was granted by the LLC in exchange for a loan of $1,750,000 to John Surgent and the LLC. The loan documents required the loan to be used to pay off prior mortgages and for home improvement. The record indicates that the loan was used for those purposes.

Defendants' arguments with regard to the validity of the Mortgage primarily center on John Surgent's ability to bind the LLC. This court holds that he did. The LLC filed corporate governance documents (hereafter, the "Documents") for the express purpose of granting John Surgent the authority to enter into the mortgage transaction. These documents include: (1) Consent of Members, (2) Minutes of Special Meeting of R.H. Surgent, LLC, (3) Member Consent, and (4) Manager Certificate. The documents were signed by Defendants John Surgent and Regina Surgent in front of a notary.

In a 2007 deposition, taken during discovery in the forfeiture proceeding, Defendant Regina Surgent herself stated that she executed those Documents to "make [John] manager for a short period of time so he could get refinancing." Her attorney, Defendant Kessler, certainly argued on her behalf that Regina Surgent was a co-obligor, individually, and/or as principal of the LLC, *never challenging* John Surgent's ability to bind the LLC or the validity of the Mortgage. Kessler further acknowledged that John was required to sign on behalf of the LLC (presumably, *because he was its manager*), that the executed Documents "acknowledg[ed] the resignation of Regina as managing officer and . . . appoint[ed] John Surgent as managing officer of the LLC." And Kessler argued that the Documents had been executed by both Defendants John Surgent and Regina Surgent.

As will be discussed below, to the extent that Regina Surgent now argues that John Surgent

had no authority to bind the LLC as its manager and that the resultant mortgage is invalid, her arguments are barred by the doctrines of judicial estoppel and/or the "Sham Affidavit" doctrine. Kessler, a law professor that has written treatises on forfeiture proceedings,[3] presented a case both before a federal magistrate and judge which was comprehensive in nature, supported by facts as they existed then and now, and was ultimately successful. While Kessler will not be bound by the above doctrines, his current argument that his presentation in the forfeiture proceeding was based on a lack of personal knowledge and misinformation is entirely specious, meritless, and amounts to nothing more than a bald assertion unsupported by the facts.[4] And, as a non-party to the Mortgage, he is further unable to successfully challenge the Mortgage's validity.

a. Defendant Regina Surgent's Arguments as to the validity of the Mortgage

Regina Surgent's arguments as to the validity of the mortgage are barred by judicial estoppel and/or may be disregarded under the "Sham Affidavit" doctrine.

"The doctrine of judicial estoppel is well entrenched in New Jersey's jurisprudence." Newell v. Hudson, 376 N.J. Super. 29, 38, 868 A.2d 1149 (App. Div. 2005). Judicial estoppel "bars a party to a legal proceeding from arguing a position inconsistent with one previously asserted." State v. Gonzalez, 142 N.J. 618, 632 (1995); see also Cummings v. Bahr, 295 N.J. Super. 374, 385 (App. Div. 1996) (under New Jersey law, "[t]he doctrine of judicial estoppel operates to 'bar a party to a legal proceeding from arguing a position inconsistent with one previously asserted.'"). Essentially, if a litigant's position in one matter is true, then the contrary position in the subsequent matter cannot be. Thus, the doctrine is not intended to bar every inconsistency, but "[r]ather [is] designed to prevent litigants from 'playing fast and loose with the courts.'" Cummings, 295 N.J.

[3] See Steven L. Kessler, Esq., Civil & Criminal Forfeiture: Federal and State Practice, Thomson Reuters (2002-18)
[4] Further, there is nothing in the record to suggest he has taken steps to correct these alleged misrepresentations to the federal court, as required by NJ and NY RPC 3.3.

Super. at 387 (citing Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 358 (3d Cir. 1996)). In doing so, the doctrine protects the "integrity of the judicial process." Kimball Int'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 606 (App. Div. 2000).

Nevertheless, the application of judicial estoppel is an extraordinary remedy and its application is subject to the court's sound discretion. See Klein v. Stahl GMBH & Co. Maschinefabrik, 185 F.3d 98, 108 (3d Cir. 1999) (citing McNemar v. Disney Store, Inc., 91 F.3d 610, 613 (3d Cir. 1996) (Appellate courts "review the application of judicial estoppel under an 'abuse of discretion' standard"), cert. denied, 519 U.S. 1115, 117 S. Ct. 958, 136 L. Ed. 2d 845 (1997)). Thus, judicial estoppel "should be invoked only 'when a party's inconsistent behavior will otherwise result in a miscarriage of justice.'" Kimball Int'l, Inc., 334 N.J. Super. at 608 (quoting Ryan Operations, 81 F.3d at 365).

Here, miscarriage of justice would manifest if Regina Surgent were permitted to argue, for the first time, that the Mortgage is not valid and must be discharged. Her arguments to the contrary, that the transfer of interest in the Property from herself to the LLC was valid, that the Mortgage was valid, and that the Property should not be subject to forfeiture, were made to great benefit at the forfeiture proceedings in which she prevailed. The court also notes that these arguments were not raised in any of the earlier forfeiture actions brought by Plaintiff. Regina Surgent received the benefit of the Mortgage. The record indicates that the proceeds of the Loan secured by the Mortgage were used to pay off prior mortgages and renovate the Property. Regina Surgent has lived at the Property nearly continuously since the Loan's inception, and, it must be noted, without payment since 2006. Regina Surgent will not be permitted to "play fast and loose" with the courts to escape obligation that she legitimately incurred and from which she benefited enormously.

Note, "[b]ad faith . . . is not a requirement [of judicial estoppel] in New Jersey." Atlantic

City v. Cal. Ave. Ventures, LLC, 23 N.J. Tax 62, 68-69 (App. Div. 2006) (citing Kimball Int'l, Inc., 334 N.J. Super. at 608 n.4). This court need not, and does not, examine the possible motive belaying Regina Surgent's inconsistent statements in its application of judicial estoppel. Nevertheless, her motive is obvious: to walk away from the Mortgage obligation and allow the LLC, and by extension, her, to control the Property free and clear of any outstanding debt to Plaintiff.

Where a party submits an affidavit inconsistent with prior deposition testimony for the purpose of defeating summary judgment and no valid explanation is provided for the inconsistency, the court is free to disregard the affidavit as a sham. See Shelcusky v. Garjulio, 172 N.J. 185 (2002); see also Hinton v. Meyers, 416 N.J. Super. 141, 150, 3 A.3d 601 (App. Div. 2010) ("[A] trial court may reject an affidavit as a sham when it 'contradict[s] patently and sharply' earlier deposition testimony, there is no reasonable explanation offered for the contradiction, and at the time the deposition testimony was elicited, there was no confusion or lack of clarity evident from the record.") (quoting Shelcusky, 172 N.J. at 201-02).

In deposition testimony, both in this matter and in the forfeiture proceeding, Regina Surgent never raised the arguments she raises now in opposition to summary judgment. These arguments, that John Surgent had no authority to bind the LLC, that her signature was forged on certain documents, and that the Mortgage is not valid, are also convenient and spurious.

Thus, this court finds it appropriate to disregard Defendant Regina Surgent's affidavit under the "Sham Affidavit" doctrine and deem her inconsistent statements and arguments insufficient to raise genuine issues of material fact even if those statements and arguments are not barred outright by judicial estoppel.

Further, even if Regina Surgent's arguments were afforded consideration by the court, they are meritless. For example, her new assertion that the mortgage is invalid because her signature was

(allegedly) forged. A borrower who makes payments under a note or mortgage will be estopped from later disclaiming liability on the basis of forgery. Russell v. Second Nat'l Bank, 136 N.J.L. 270, 277-78 (E. & A. 1947). The court notes that the Defendant herself made payments from July 3, 2002 to January 1, 2006. As will be discussed more fully below, Defendant Regina Surgent's conduct following the loan, including payments tendered on behalf of the LLC, is sufficient to invoke the doctrines of ratification, equitable mortgage, and equitable subrogation, such that the Mortgage is enforceable.

b. Even if the mortgage were legally deficient, Plaintiff has a right to foreclose based on the doctrines of ratification, equitable mortgage, and equitable subrogation

Briefly, even if the mortgage were legally deficient, Plaintiff would be entitled to enforce its terms under the equitable doctrines of ratification, equitable mortgage, and equitable subrogation.

Ratification "is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." See Thermo Contracting Corp. v. Bank of New Jersey, 69 N.J. 352, 361 (1976) (quoting Restatement (Second) of Agency § 82 (1957)). Ratification may be demonstrated by "acts, words, or conduct on the part of the principal, which reasonably tend to show an intention to ratify the unauthorized acts or transactions of the agent." Ratajczak v. Board of Ed. of Perth Amboy, 114 N.J.L. 577, 581 (1935). Even if John Surgent were not authorized to bind the LLC, Defendant Regina Surgent and the LLC ratified the mortgage by her conduct. The loan was utilized to pay off prior mortgages and to substantially renovate the Property. Further, Regina Surgent ratified the Mortgage both individually and on behalf of the LLC by continuing to make payments on the Loan, including after John Surgent went to prison. Payments only ceased, in 2006, because of financial constraints; the validity of the mortgage was never questioned until this current foreclosure action was brought by Plaintiff. Here, where Defendants benefited from the

mortgage and acquiesced to its terms, the mortgage may be deemed ratified as a matter of law. See, e.g. Thermo, 69 N.J. at 364 (New Jersey Supreme Court affirmance of Appellate Division's grant of summary judgment on issue of ratification).

An equitable mortgage is created "by agreement of the parties." Reibman v. Myers, 451 N.J. Super. 32 (App. Div. 2017) (citing James Talcott, Inc. v. Roto Am. Corp., 123 N.J. Super. 183, 203, 302 A.2d 147 (Ch. Div. 1973)). "If an intent to give, charge, or pledge property, real or personal, as security for an obligation, appears, and the property or thing intended to be given, charged, or pledged is sufficiently described or identified, then the equitable lien or mortgage will follow as of course." Rutherford Nat. Bank v. H.R. Bogle & Co., 114 N.J. Eq. 571, 574 (Ch. 1933). The facts of Reibman are analogous. In that case, the Appellate Division found that an equitable mortgage existed when the plaintiff's husband allegedly mortgaged their property without her knowledge or consent. See Reibman, 451 N.J. Super at 32. There, like here, the spouse "reaped the befits of the mortgage" by renovating the property, living in the marital home without paying tax or homeowner's insurance, and did not question the existence or validity of the mortgage. Id. In that case, however, the wife was unaware of the mortgage against the property. Here, Regina Surgent was not only aware of the mortgage, she had executed corporate documents for the express purpose of giving John Surgent the authority to obtain a loan and execute a mortgage on behalf of the LLC. Even if these documents were somehow legally deficient, Plaintiff would be entitled to an equitable mortgage as a matter of law based upon the agreement of the parties, the benefit conferred upon Defendants and their acquiescence to the mortgage.

Under the doctrine of equitable subrogation, a mortgagee is permitted to stand in the shoes of a prior lender where the mortgagee's funds were used to pay off the prior lender's lien on the property. See, e.g. U.S. Bank, N.A. v. Hylton, 403 N.J. Super. 630, 637 (App. Div. 2008). This

doctrine is "highly favored in the law," see id., and has been applied for over a century. See Investors Sav. Bank v. Keybank, N.A., 424 N.J. Super. 439, 447 (App. Div. 2012) (internal citations omitted). There is no question that Plaintiff's loan was used to pay off prior mortgages, specifically, the loans issued by PNC Bank and Hudson City Savings Bank. In the event that the LLC did not validly encumber the Property with Plaintiff's mortgage (and again, this court holds that it did), Plaintiff is equitably subrogated to the lien position enjoyed by the prior liens it satisfied, that is, the first lien position.

c. Defendant Kessler's arguments as to the validity of the Mortgage

Kessler is the quintessential "stranger to the dispute" upon whom standing will not be conferred. See Rosenstein v. State, Dep't of Treasury, Div. of Pensions & Benefits, 438 N.J. Super. 491, 496 (App. Div. 2014) ("[O]ur courts will not 'function in the abstract' or entertain proceedings commenced 'by plaintiffs who are 'mere intermeddlers,' . . . interlopers or strangers to the dispute . . . .'") (quoting Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y., 58 N.J. 98, 107 (1971)).

While Kessler has vehemently resisted application of the general principal that litigants in foreclosure cases "generally have no standing to assert the rights of third parties," Bank of N.Y. v. Raftogianis, 418 N.J. Super. 323, 350 (Ch. Div. 2010), he has not cited a single case or authority in which standing was conferred upon a third-party judgment creditor seeking to challenge the validity of the underlying mortgage. To the contrary, Plaintiff has cited numerous examples, such as Adelman v. BSI Fin. Servs., 453 N.J. Super. 31 (App. Div. 2018), in which a breach of contract and Consumer Fraud Act claims against the lender were dismissed because the claimant "was not a party to the original mortgage, note, or modification . . . ." Further, Kessler's judgment is against Regina Surgent *individually*; he has no judgment against the LLC and has no interest in the Property.

Relegated to the stands, Kessler aims to get into the batter's box by way of his Fraudulent Conveyance and "Reverse Veil Piercing" claims. Kessler, if successful, would thereby either invalidate the transfer such that the Property would be held by Regina Surgent (and would thus be reachable by his judgment) or have the court disregard the corporate form and use the LLC's assets to satisfy the debt of Regina Surgent. As will be discussed below, both claims fail.

i. *Defendant Kessler's Standing Generally*

The court has not lost sight of the fact that, at its essence, this is a foreclosure action brought by Plaintiff to recover the collateralized security for a loan twelve (12) years in default. It is not an open forum in which any party may assert any claim it may have against any other party. While the court recognizes that New Jersey courts have applied a liberal standard for determining whether or not a litigant has standing to assert a cause of action, see Rosenstein, 438 N.J. Super. at 496, standing is not automatic. See EnviroFinance Grp., LLC v. Environmental Barrier Co. LLC, 440 N.J. Super. 325, 340 (App. Div. 2015).

The first step in the standing analysis is to determine whether or not the claimant has "a sufficient stake in the outcome of the litigation." See, e.g. N.J. Citizen Action v. Riviera Motel Corp 296 N.J. Super. 402, 409 (App. Div. 1997) ("In order to possess standing, the plaintiff must have a sufficient stake in the outcome of the litigation . . . ."). Here, Kessler does not have any non-remote stake in the outcome of the foreclosure action. His judgment is against Regina Surgent individually. Unlike a judgment creditor with a valid lien against a property, whose lien would be extinguished by a superior lender's foreclosure action, Kessler has no lien against the Property to extinguish. Whether or not Plaintiff is successful in its foreclosure will have no impact on the enforceability of Kessler's judgment.

ii. *Defendant Steven Kessler's Counterclaims*

Obfuscating this point, Kessler has brought counterclaims for Fraudulent Conveyance and "Reverse Veil Piercing." Success on either claim would allow Kessler to assert his judgment against the Property; they are the means through which he seeks to gain a "sufficient stake in the outcome of the litigation."

As an initial matter, these claims are non-germane to the foreclosure and are fit for dismissal. Rule 4:64-5 is clear that "[o]nly germane counterclaims and cross-claims may be pleaded in foreclosure actions without leave of court." No leave has been granted in the instant action to raise non-germane counterclaims. Nevertheless, the court will address them.

Defendant Kessler's first counterclaim seeks to use the Uniform Fraudulent Transfer Act, N.J.S.A. 25:2-20 *et seq.* (hereafter, the "UFTA"), to undo the 1999 transfer of the Property from Regina Surgent to the LLC. Defendant Kessler seeks relief under both the actual fraud (§ 25(a)) and the constructive fraud (§ 25(b)) sections of the statute.

First, Kessler's claims under the UFTA are barred by the statute of limitations. The statute of limitations for actual fraud claims under § 25(a) is four years from the date of the transfer or one year after the transfer is discovered by the claimant, whichever is later. See N.J.S.A. 25:2-31(a). Here, Kessler must have learned of the transfer in August of 2005 when he commenced his representation of Regina Surgent. Kessler certainly represented to the court in the forfeiture proceeding, in November 2007, that the Property was transferred from Regina Surgent to the LLC. Whether or not the court sets August 2005 or November 2007 as the date from which the statute of limitations for the actual fraud claim began to run, it is now far outside of the boundary of the four year statute of limitations. Constructive fraud claims, under § 25(b) are subject to a four year statute of limitations that begins to run from the date of the transfer. That claim is similarly barred by the

statute of limitations.

Second, even if the statute of limitations under the UFTA were somehow tolled, Kessler has not introduced anything to suggest that Regina Surgent transferred the Property to the LLC "with actual intent to hinder, delay, or defraud" or the other grounds for deeming a transfer fraudulent under § 25(b). Kessler's baseless assertion that the transfer was fraudulent is insufficient to defeat summary judgment as to this counterclaim even if it were not barred by the statute of limitations.

Defendant Kessler's second counterclaim asks the court to reverse veil pierce the corporate veil of the LLC and use its asset, the Property, to satisfy Regina Surgent's personal debt. Generally, veil piercing is "an equitable remedy whereby 'the protections of corporate formation are lost' and the parent corporation may be found liable for the actions of the subsidiary." Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 199 (App. Div. 2006) (quoting Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 215 F. Supp. 2d 482, 497 (D.N.J. 2002)). Reverse veil piercing occurs where "assets of the corporate entity are used to satisfy the debts of a corporate insider so that the corporate entity and the individual will be considered one and the same." Repetti v. Vitale, No. A-0424-10T2 (App. Div. Sept. 9, 2011) (slip op. at 5)[5]. Veil piercing is to be employed in rare circumstances "to prevent an independent corporation from being used to defeat the ends of justice, to perpetrate fraud, to accomplish a crime, or otherwise to evade the law." Shotmeyer v. N.J. Realty Title Ins. Co., 195 N.J. 72, 86 (2008). It is only applied where there is "clear and convincing evidence of 'fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from public liability for a crime.'" Kaplan v. First Options of

[5] Although generally pursuant to R. 1:36-3, "no unpublished opinion shall be cited by any court," the court is empowered to cite unpublished opinions "to the extent required by res judicata, collateral estoppel, the single controversy doctrine or [to extrapolate for reasons independent of the non-binding nature] **any other similar principle of law**." R. 1:36-3 (emphasis added). While "[n]o unpublished opinion shall constitute precedent or be binding upon any court," R. 1:36-3 permits not only citations, but also evaluations into the reasoning set forth in an unpublished opinion such as Repetti v. Vitale, No. A-0424-10T2 (App. Div. Sept. 9, 2011), for its persuasive authority. Ibid.

Chicago, Inc., 19 F.3d 1503, 1520-22 (3d. Cir. 1994) (internal citations omitted).

This court declines to apply the doctrine of reverse veil piercing to allow the Property to be used to satisfy Kessler's personal judgment against Regina Surgent.

To start, its application would be moot. An issue is moot "when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." Greenfield v. N.J. Dep't of Corrs., 382 N.J. Super. 254, 257-58 (App. Div. 2006). For the reasons stated herein, under the theories of legal mortgage, ratification, equitable mortgage, and equitable subrogation, Plaintiff has a valid first-position encumbrance on the Property. Further, this encumbrance is greater than the total value of the Property such that all junior liens will be extinguished upon the conclusion of the foreclosure action. Kessler, even if he were to be successful in reverse veil piercing the LLC, would be unable to unseat Plaintiff's first priority position and would be unable to collect on his judgment.

Further, veil piercing is an equitable doctrine, and, whether or not it has been applied at all in New Jersey,[6] it would be inequitable to apply it here. Plaintiff issued its loan in 2000, long before Kessler met Regina Surgent (2005) and over a decade before he was issued a judgment against her (2017). To date, Plaintiff has advanced over $750,000 in taxes, insurance, and other carrying costs since default occurred in 2005. Kessler's prayer for relief, that this court will permit him to reach the Property to satisfy his debt, either ignores Plaintiff's first lien position or would necessarily harm Plaintiff, an innocent party.

d. Defendant John Surgent's arguments as to the validity of the Mortgage

John Surgent, as his papers concede, has no interest in the LLC or the Property. As stated above with regard to Kessler, he thus has no standing to contest the validity of the Mortgage. See

[6] The court in Repetti v. Vitale, No. A-0424-10T2 (App. Div. Sept. 9, 2011), found that it had not, though the matter has devolved into a dispute between Plaintiff's and Defendant Kessler's counsel.

Raftogianis, 418 N.J. Super. 323, 350. He has failed to explain, in his opposition papers or at oral argument, his basis for asserting standing to contest the foreclosure. The mere fact that he executed loan documents on behalf of the LLC, as its then manager, is insufficient to confer standing on him to challenge the validity of Plaintiff's mortgage or its right to enforce same.

Further, the various affirmative defenses cited by John Surgent are meritless. For example, he has repeatedly asserted that Plaintiff does not have standing to bring the instant foreclosure action. However, Plaintiff, the original lender by way of merger and has certified to its possession of the original Note. See Deutsche Bank Trust Co. v. Angeles, 428 N.J. Super. 315, 318 (App. Div. 2012) (either possession of the note or an assignment of the mortgage that predates the original complaint confers standing to foreclose).

John Surgent's affirmative defenses lack all factual and/or legal support and must be stricken. For example, his Fair Debt Collection Practices Act defense ignores the fact that Plaintiff is not a debt collector as the debt it seeks to collect is its own. See Henson v. Santander Consumer USA, Inc., 582 U.S. __, 137 S. Ct. 1718, 198 L. Ed. 2d 177 (2017) (Holding that the FDCPA does not apply to debt collectors collecting a debt owed to themselves). He also raises the defense of predatory lending, notwithstanding the fact that New Jersey's courts have refused to recognize same in the mortgage context. See gen. United Jersey Bank v. Kensey, 306 N.J. Super. 540, 552 (App. Div. 1997) certif. denied, 153 N.J. 402 (1998) ("there is no presumed fiduciary relationship between a bank and its customer . . . the virtually unanimous rule is that creditor-debtor relationships rarely give rise to a fiduciary duty.).

John Surgent has also argued that the instant motion for summary judgment is premature as he has not had the opportunity to conduct full discovery. He has submitted to Plaintiff three document requests (with eighty-one (81) categories of documents), 45 interrogatories, and 236

requests to admit. His discovery sought is irrelevant (for example, information on collateralized debt obligations and agreements he is not a party to and documents relating to various other matters involving Plaintiff in other jurisdictions), improper (such as admission requests calling for Plaintiff to admit conclusions of law), and overly burdensome. Further, to the extent John Surgent has requested relevant discovery, he has already been served with Plaintiff's responses to Kessler's document requests and interrogatories, plus an additional 1,089 pages of documents. The court will not delay this matter, further prejudicing Plaintiff, to permit a party without standing to contest the validity of the Mortgage to conduct such irrelevant, overly burdensome discovery.

3. Plaintiff's failure to file a petition in the forfeiture proceeding is of no moment

Much has been made of Plaintiff's failure to submit a petition in the forfeiture proceeding, the argument being that this failure caused Plaintiff to forfeit its interest in the Property. The court disagrees and finds this argument clearly erroneous.

The relevant statute, 21 U.S.C. § 853(n), concerns post-criminal trial ancillary proceedings through which third parties may seek to recover an interest in forfeited property. The purpose of these ancillary proceedings is to allow the District Court to amend orders of forfeiture when a third party claims an interest in property to be forfeited. See Willis Mgmt. (Vt.), Ltd. v. United States, 652 F.3d 236, 246 (2d Cir. 2011). A third party that does not file a petition asserting its interest in the to-be-forfeited property following publication by the Government of the order of forfeiture risks having its interest extinguished. See 21 U.S.C. § 853(n)(7).

However, such proceedings are only triggered where the Government prevails and an order for forfeiture is entered. See 21 U.S.C. § 853(n)(1) ("Following the entry of an order of forfeiture . . . "). Here, Regina Surgent and the LLC prevailed. When the final order of forfeiture was entered, the Property was not included and Plaintiff was never required to protect its interest by filing a

petition. See United States v. Gilbert, 244 F.3d 888 (11th Cir. 2001) (holding that third parties must wait until the *final* order of forfeiture before they can file an ancillary petition). In actuality, a Consent Order was entered into (as stated above), memorializing an agreement between the Government and Plaintiff that Plaintiff had a legitimate interest in the Property superior to that of the Government and that the Government would forbear from divesting the interest of Plaintiff in its forfeiture action.

Even if the matter had proceeded as to the Property, the purpose of such petitions are to put the Government on notice that a third-party is asserting an interest in to-be-forfeited property. See 21 U.S.C. § 853(n)(2). A hearing is then scheduled to "adjudicate the validity of [the third party's] alleged interest in the property." Id. The Consent Order is clear indicia that the Government was (1) on notice as to Plaintiff's claim and (2) had no question as to its validity. Any hearing, in which Plaintiff's interest would have been uncontested by the Government, would have been unnecessary. And, in any event, Regina Surgent and the LLC prevailed, the Property was not subject to forfeiture, and there was no extinguishing of any interests in the Property.

Defendants' theory, that the failure to file a petition leads to the extinguishing of any rights in Property *not actually forfeited* has no legal support and is meritless. The plain language of the statute, the court's primary guide, provides that the only consequence of failing to file a petition is that the United States shall have clear title to the property that is subject of the order of forfeiture. See 21 U.S.C. § 853(n)(7). Defendants have failed to cite a single case to the contrary and their unsupported argument fails.

4. The instant action is not barred by the doctrine of Laches

Defendants argue that Plaintiff's foreclosure action should be barred by the doctrine of laches. The court disagrees.

Laches is an equitable doctrine that operates as an affirmative defense, precluding relief when there is an "unexplainable and inexcusable delay" in exercising a right. Fox v. Millman, 210 N.J. 401 (2012) (quoting Cnty. Of Morris v. Fauver, 153 N.J. 80, 105 (1998). Laches is "invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party." Knorr v. Smeal, 178 N.J. 169, 180-81 (2003). However, laches is rarely applied where a cause of action is governed by a statute of limitations.

The statute of limitations for the instant foreclosure action is twenty (20) years from the date of default. N.J.S.A. 2A:50-56.1 The application of laches in contravention of a statute of limitations "would replace the regular and predictable time limits fixed by our Legislature through the statutes of limitations with a system in which no lawyer or litigant could be confident of the time that would govern the initiation of litigation." Fox, 210 N.J. at 422. Thus, only the "rarest of circumstances and only overwhelming equitable concerns" would permit a court to shorten an otherwise permissible period for initiation of litigation because of delay. Id. at 423. Such circumstances and equitable concerns are not present here. Plaintiff's delay is not inexcusable or unexplained. And, no prejudice has resulted to Defendants John and Regina Surgent. In reality, an enormous benefit has been conferred upon them. Since default in 2006, Plaintiff has paid all of the carrying costs of the Property, including taxes and insurance, while Regina Surgent occupied the Property without payment. Since his release from prison, John Surgent has also resided at the Property. For those reasons, the court will not apply to doctrine of laches to bar Plaintiff's right to foreclose.

5. Plaintiff has established its *prima facie* right to foreclose

As a result of the foregoing, it is clear that Plaintiff has established its *prima facie* right to foreclose on the Property. Again, the only material issues in a foreclosure proceeding are the validity

of the mortgage, the amount of indebtedness, and the right of the mortgagee to foreclose on the mortgaged property. Great Falls Bank, 263 N.J. Super. at 394. Plaintiff has demonstrated proof of the execution of the mortgage, the recording of the lien, and non-payment of the mortgage. See Thorpe v. Floremoore Corp., 20 N.J. Super. 34, 37 (App. Div. 1952) ("Since the execution, recording, and non-payment of the mortgage was conceded, a *prima facie* right to foreclose was made out"). Plaintiff has further certified that it is in possession of the original Note. See Angeles, 428 N.J. Super. at 318. As the Defendants' Contesting Answers have failed to challenge any of the essential elements of the foreclosure action, Plaintiff is entitled to strike Defendants' Answers. Old Republic Ins. Co. v. Currie, 284 N.J. Super. 571, 574 (Ch. Div. 1995). The matter is to be remitted to the Office of Foreclosure as uncontested for the issuance of final judgment.

6. Conclusion

Plaintiff has established the validity of the transfer of interest in the Property from Regina Surgent to the LLC, the validity of the mortgage, and its right to enforce same. Regina Surgent's arguments, to the extent not barred as a matter of law, are meritless and insufficient to defeat summary judgment. John Surgent and Steven Kessler both lack standing to challenge the foreclosure, and, even if standing were conferred, their arguments are meritless. Plaintiff's failure to file a petition in the forfeiture proceeding is of no moment (as filing of same was not required). The court also declines to apply the doctrine of laches to bar the instant action.

Plaintiff's Motion for a Protective Order is denied, without prejudice, as moot. As this matter is remitted to the Office of Foreclosure to proceed as uncontested, no further discovery is required.

For the foregoing reasons, Plaintiff's motion is granted. An order accompanies this decision.