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EAST-WEST FUNDING, LLC,

Plaintiff,

v.

575 RIVER ROAD EDGEWATER, LLC, NEW ASIA USA HOLDING LLC, FAN LIU a/k/a RICHARD LIU, ABC COMPANIES 1-5, and JOHN and JANE DOES 1-5.

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY
DOCKET NO. F-10657-22

OPINION

Argued: March 22, 2024
Decided: April 5, 2024

Appearances: Shafron Law Group, LLC, (Jason Shafron, Esq., appearing) for Plaintiffs.
Newman, Simpson & Cohen, LLP (Daniel J. Cohen, Esq., appearing) for Defendants.

HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter comes before the Court by way of a Motion to Strike Answer filed on July 7, 2023 by Plaintiff, East-West Funding, LLC ("Plaintiff"), by and through its substituted counsel Shafron Law Group, LLC (Jason T. Shafron, Esq., appearing). On September 14, 2023, Defendants, 575 River Road Edgewater, LLC, New Asia Holding LLC, and Fan Liu a/k/a Richard Liu (collectively, the "Defendants" or "Borrowers"), by and through their substituted counsel Newman, Simpson & Cohen, LLP (Daniel J. Cohen, Esq., appearing), filed a Cross-Motion for Leave to File a Counterclaim and Opposition to Plaintiff's Motion to Strike Answer. Plaintiff

thereafter submitted a reply on September 20, 2023. The Court heard oral argument on March 22, 2024.

On or about June 28, 2021, TIG Romspen US Master Mortgage LP ("Romspen" or "Lender") and 575 River Road Edgewater, LLC ("Defendant" or "Borrower") executed a certain Loan Agreement (the "Loan Agreement").

On even date, Defendant executed a Promissory Note for an amount up to $27,000,000.00 with an interest rate of 11.500% per annum in favor of Romspen. On the January 1, 2023 maturity date of the Promissory Note, the entire outstanding principal balance, all accrued and unpaid interest and all other amounts due under the loan documents became due and payable. In the event of default by Borrower, the interest would begin to accrue on the principal balance at the default interest rate, which would subsequently increase the interest rate by 5.00 percentage points.

To secure the Note, Defendant executed to Romspen a Mortgage, Assignment of Leases and Rents and Security Agreement (the "Mortgage") for an amount up to $27,000,000.00. In doing so, Defendant conveyed to Romspen certain real property known as Lots 1 and 2, Block 82, on the Tax Map of the Borough of Edgewater, Bergen County, New Jersey 07020 (the "Property"). The Mortgage was recorded in the Bergen County Clerk's Office on August 4, 2021, in Mortgage Book V4311, Page 897.

As part of the Loan Agreement, § 6.1 provided that an "Interest Reserve" would be established in order to satisfy interest payments. Pursuant to § 6.1.2, the Lender retained the discretion to withhold disbursements from the Interest Reserve in the event the Borrower did not obtain (1) final non-appealable approval from the Edgewater Zoning Board of Adjustment to permit the construction Borrower sought and (2) final approval from the New Jersey Department of Environmental Protection for the Project ("NJDEP").

In addition, on or about June 28, 2021, Defendant executed a security agreement (the "Security Agreement") in favor of Romspen to further secure repayment. Rompsen filed a Uniform Commercial Code financing statement, Number 2021125212 ("UCC-1"), which was recorded in the Bergen County Clerk's Office on August 4, 2021, in Mortgage Book 4311, Page 941. On same date as the Note's execution, Defendant also executed and delivered an Assignment of Rents and Leases (the "Assignment of Rents") in favor of Romspen, which was recorded in the Bergen County Clerk's Office in Mortgage Book V4311, Page 926 on August 4, 2021.

Also, on or about June 28, 2021, Pledgor executed a pledge agreement in favor of Romspen (the "Pledge Agreement"). On that same date, Fan Liu a/k/a Richard Liu ("Mr. Liu") executed a Guaranty of Payment and Performance in favor of Romspen (the "Guaranty Agreement").

On or about March 9, 2022, Romspen executed and delivered an Allonge (the "Allonge") to Plaintiff which conveyed to Plaintiff all of Romspen's right, title and interest in and to the Promissory Note and the related Loan Documents. On even date, Romspen executed and delivered an Assignment of Mortgage in favor of Plaintiff. The Assignment of Mortgage was recorded in the Bergen County Clerk's Office on April 11, 2022 in Mortgage Book V4649, Page 142.

The Note states that "Lender shall have the right to declare" that the debt shall become immediately due and payable "at the option of the Lender if any payment required in this Note (i) is not paid on or prior to the date when due, or on the happening of any other Event of Default, . . . or (ii) if not paid on the Maturity Date."

The Loan Documents provide that, in the event any sum payable under the Note and Mortgage is not paid when due, Borrower shall pay a late charge equal to 5.00% of the delinquent payment.

Default occurred as a result of the failure to make monthly debt service payments due on

March 1, 2022 (the "Default Date"), and subsequently due on April 1, 2022, May 1, 2022, June 1, 2022, and July 1, 2022. Defendants further failed to pay any late charges. Plaintiff formally declared Defendant and Mr. Liu in default for failure to make the above payments on June 14, 2022.

On October 5, 2022, Plaintiff, by and through former counsel Robert P. Travers Law, LLC, filed its foreclose complaint to commence suit. Defendants filed a Contesting Answer (the "Answer"), by and through former counsel Cohn Lifland Pearlman Herrmann & Knopf, LLP, on November 11, 2022.

On March 20, 2023, Shafron Law Group, LLC, substituted in as Plaintiff's counsel and remains so. On August 1, 2023, Newman, Simpson & Cohen, LLP, substituted in as Defendants' counsel.

In a foreclosure proceeding, the only material issues are the validity of the note and mortgage, whether the loan is in default (or the amount of indebtedness), and the right of the plaintiff to resort to the mortgaged premises in satisfaction of the debt, i.e., 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); Thorpe v. Floremoore Corp., 20 N.J. Super. 34, 37 (App. Div. 1952). If the mortgagor'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). Answers that deny the allegations in the complaint or that raise separate defenses are deemed non-contesting unless they "either contest the validity or priority of the mortgage or the lien being foreclosed or create an issue with respect to [the mortgagee's] right to foreclose it." R. 4:64-1(c)(2). Therefore, a foreclosing mortgagee makes out such a prima facie case by demonstrating

execution, delivery, and nonpayment of the mortgage. Thorpe, 20 N.J. Super. at 37 (App. Div. 1952).

Plaintiff argues that there is no genuine issue of material fact as Defendants have not provided evidence which contests the three material issues of a foreclosure action: (1) the validity of the note and mortgage, (2) whether the loan is in default, and (3) Plaintiff's right to resort to the mortgaged premises. R. 4:46-2(c); Pardo, 263 N.J. Super. at 394. Plaintiff asserts that Defendants have provided no evidence to rebut the fact that Plaintiff has owned and been in physical possession of the Mortgage, Note, and other Loan Documents since Romspen's assignment of those documents to Plaintiff.

Although not disputing Plaintiff's proofs as to possession of the pertinent Loan Documents nor contesting Plaintiff's right to foreclose, Defendants primarily take issue with the conduct of both the original lender and Plaintiff, including Plaintiff's and Plaintiff's principal's conduct thereafter. Defendants specifically argue that this suspicious conduct hindered their ability to perform under the Loan Documents, thereby causing Defendants to default.

First, to have standing in a foreclosure proceeding, a mortgagee must own or control the underlying debt. Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597 (App. Div. 2011). To establish standing to bring a foreclosure action, a plaintiff must show that it is either in possession of the note or was assigned the mortgage at the time it brough the complaint. Deutsche Bank v. Mitchell, 422 N.J. Super. 214, 255 (App. Div. 2011). There are three categories of persons entitled to enforce negotiable instruments: (1) "the holder of the instrument," (2) "a nonholder in possession of the instrument who has the rights of a holder," or (3) "a person not in possession of the instrument who is entitled to enforce the instrument pursuant to [N.J.S.A. 12A:3-309]." N.J.S.A. 12A:3-301.

The Mitchell Court stated that the plaintiff "could have established standing as an assignee, N.J.S.A. 46:9-9, if it had presented an authenticated assignment indicating it was assigned the note before it filed the complaint." Id. The Appellate Division, in Deutsche Bank Trust Co. Americas v. Angeles, 428 N.J. Super. 315, 318 (App. Div. 2012), clarified that "[i]n Mitchell, we held that either possession of the note **or** an assignment of the mortgage that **predated the original complaint** conferred standing." (emphasis added).

Here, Plaintiff has established ownership or control as it is a "person entitled to enforce" the instrument within the meaning of N.J.S.A. 12A:3-301. Through the Certification of Regina Arfuso, Plaintiff has established that it was assigned the mortgage and was in possession of the note on and before the date it filed the foreclosure complaint. (See Arfuso Cert. ¶¶ 6, 15-16, 20); See N.J.S.A. 12A:3-301. Namely, Plaintiff attaches as Exhibits B and K to the Arfuso Cert. a copy of the original promissory note with the Allonge affixed thereto and the duly recorded assignment of the mortgage, respectively. Further, Defendants do not contest Plaintiff's status as holder of the Note and Mortgage in any way.

Likewise, Plaintiff has satisfied the prima facie elements in order to foreclosure the Property. Through the Certification of Regina Arfuso, Plaintiff has established the material issues of a foreclosure action. Specifically, Plaintiff has proven Defendant executed the Note and Mortgage; both the Note and Mortgage were recorded in the Bergen County Clerk's Office and subsequently assigned to Plaintiff and the Note was transferred to Plaintiff by way of Allonge; and Defendants failed to make certain payments under the Note and Mortgage. (See Arfuso Cert. ¶¶ 6, 15-16, 20); see also Pardo, 263 N.J. Super. at 394. Thus, the Court finds that Plaintiff has established, with sufficient factual support, its prima facie right to foreclose. See Thorpe, 20 N.J. Super. at 37 (App. Div. 1952).

Further, Plaintiff argues that Defendants' Answer merely asserts nine affirmative defenses in boilerplate fashion in contravention of R. 4:5-4, which states that "[a] responsive pleading shall set forth specifically and separately a statement of facts constituting an avoidance or affirmative defense." Specifically, Defendants do not contest the fact that they had executed the subject loan documents, the validity or priority of the mortgage or Plaintiff's right to foreclose.

Whereas Defendants' primary point of contention is with the conduct of Romspen in connection with its alleged interference with Defendants' ability to perform under the Loan Agreement including Plaintiff's sudden acquisition of the Loan Documents and conduct thereafter.

Summary judgment is designed 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). Under New Jersey's summary judgment standard, as set forth it in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), a movant is entitled to summary judgment if the adverse party, having all facts and inferences viewed most favorably towards it, has not demonstrated the existence of a relevant material issue in dispute. Thus, the court shall grant a summary judgment motion "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." R. 4:46-2(c).

The trial court's "function is not . . . to weigh the evidence and determine the truth . . . but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The trial judge 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. Id. When the facts present "a single, unavoidable resolution" and the evidence "is so one-sided that one party must prevail as a matter of law," then a trial court should grant summary judgment. Id. 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).

Once the moving party shows that no genuine issue of material facts exists, the burden then shifts to the non-moving party to present evidence there is a genuine issue for trial. Brill, 142 N.J. at 528–29. "A certification will support the grant of summary judgment only if the material facts alleged therein are based, as required by R. 1:6-6, on 'personal knowledge.'" Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 599 (App. Div. 2011) (citing Claypotch v. Heller, Inc., 360 N.J. Super., 472, 489 (App. Div. 2003)). 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); see also Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 90, 97-98 (App. Div. 2014) ("Bald assertions are not capable of either supporting or defeating summary judgment."). 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. If the non-moving party "points only to disputed issues of fact that are of an insubstantial nature, the proper disposition is summary judgment." Brill, 142 N.J. at 529.

Again, Defendants do not in any way contest the validity of the loan documents. Plaintiff is ultimately left to its proofs, which the Court finds no issue with. Plaintiff has owned and been in physical possession of the Loan Documents since the valid assignment of such documents to

Plaintiff and Defendants do not produce any evidence to rebut the validity of those documents. In other words, The Answer asserts conclusory allegations lacking in the factual support necessary "contest the validity or priority of the mortgage or the lien being foreclosed or create an issue with respect to [the mortgagee's] right to foreclose it." See R. 4:64-1(c)(2). Consequently, Defendants' responsive pleadings fail to contest the validity or priority of the mortgage, or the lien being foreclosed or create an issue with respect to Plaintiff's right to foreclose it.

While Defendants argue that summary judgment is generally inappropriate prior to the completion of discovery, the court is not barred from granting such relief prior to that time. Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003) (quoting Velantzas v. Colgate-Palmolive Co., Inc., 109 N.J. 189, 193 (1988)). A mere contention that discovery is incomplete is insufficient to bar the court from granting summary judgment. The party opposing summary judgment on such grounds may not simply assert a generic contention that discovery is incomplete, but instead "must specify what further discovery is required." Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007) (citing Auster v. Kinonian, 153 N.J. Super. 52, 56 (App. Div. 1977)). Further, the party opposing the motion on the basis that discovery is incomplete "has an obligation to demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action." Wellington, 359 N.J. at 496 (quoting Auster v. Kinonian, 153 N.J. Super. 52, 56 (App. Div. 1977)). Stated differently, the objecting party must demonstrate with some specificity the discovery sought and its materiality. In re Ocean County Comm'r of Registration for a Recheck of the Voting, 379 N.J. Super. 461, 478 (App. Div. 2005). The fact that discovery is incomplete may not defeat a summary judgment motion if it will not change the outcome of the motion. Wellington, 359 N.J. at 496.

Defendants argue that further discovery would bring light to alleged suspicious activity.

However, Defendants "must specify what further discovery is required." Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007) (citing Auster v. Kinonian, 153 N.J. Super. 52, 56 (App. Div. 1977)). Defendants simply repeat the same assertion that some sort of coordinated interference must have occurred. Therefore, it cannot be said that summary judgment must denied on the basis that further discovery is necessary as Defendants have not satisfied the "obligation to demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action." Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003) (quoting Auster v. Kinonian, 153 N.J. Super. 52, 56 (App. Div. 1977)).

As stated above, the pertinent issue Defendants raise centers on Plaintiff's and Plaintiff's principal's alleged suspicious circumstances surrounding their acquisition of the Loan Documents and those parties' conduct thereafter. Indeed, in their Opposition to the instant motion, Defendants heavily rely on the defense of unclean hands. In doing so, Defendants correctly assert that the defense of unclean hands is a germane defense/counterclaim in a foreclosure action. However, when unclean hands is alleged as a defense, it is "only germane if it ***directly relates to the original transaction that created the mortgage*** being foreclosed." East-West Funding, LLC v. 339 River Road Holdings, LLC, 2023 N.J. Super. Unpub. LEXIS 491 at *9 (citing Murphy Prop. Acquisition, LLC v. Pfister Chem. Inc., 2019 N.J. Super. Unpub. LEXIS 1483 at *10-11 (citing Joan Ryno, Inc. v. First Nat'l Bank, 208 N.J. Super. 562, 570 (App. Div. 1986)) (emphasis added). The doctrine of unclean hands is to be evaluated and applied in the court's discretion, not to punish plaintiffs, but to ensure a balancing of equities. See New Jersey Bank v. Azco Realty Co., 148 N.J. Super. 159, 166 (App. Div.), *cert. denied*, 74 N.J. 280 (1977) ("[f]oreclosure is an equitable remedy governed by the operation of traditional equitable principles and is subject to the defense of unclean hands").

A borrower may establish the defense of unclean hands in a foreclosure action by proving inequitable conduct by the lender at the inception of the loan. Leisure Tech.-Ne., Inc. v. Klingbeil Holding Co., 137 N.J. Super. 353, 356 (App. Div. 1975) ("[t]he defense of unclean hands is cognizable in a foreclosure action"); Central Penn Nat'l Bank v. Stonebridge Ltd., 185 N.J. Super. 289, 302 (Ch. Div. 1982) (a borrower may defend against enforcement of loan documents based upon allegations of impropriety "connected with the inception of the mortgage").

Namely, Defendants dispute that they should be deemed in default as a result of Romspen's inequitable conduct. (See Defendants Letter Brief in Opposition to Plaintiff's Motion and in Support of Defendant's Cross-Motion at 10) Defendants maintain that summary judgment should not be granted on the basis that this alleged inequitable conduct has caused the alleged default. Defendants argue that § 6.1.2 of the Loan Agreement entitles Defendants to disbursements from an interest reserve established from the general loan proceeds. From this Interest Reserve, Defendants would make interest payments. In accordance with the relevant section, Defendants argue that they had a right to proceeds from the Interest Reserve until they could not obtain (i) final non-appealable approval from the Edgewater Zoning Board of Adjustment and (ii) final approval from the New Jersey Department of Environmental Protection. Defendants specifically claim that they were unable to satisfy these requirements as result of Romspen intentionally failing to promptly provide the funding necessary to conduct the work needed to obtain the approvals, thereby defaulting under the Loan Documents.

In connection with Defendants' inability to acquire the required approvals, Defendants argue that suspicious and unfounded third-party appeals hindered Defendants in satisfying § 6.1.2 of the Loan Agreement. Furthermore, it is claimed that one of these third-party appeals was filed by a tenant of Plaintiff's principal. Defendants assert that as a result of this suspicious activity and

the cessation of the disbursements from the Interest Reserve, Plaintiff claimed that Defendants should have made the interest payments from their own funds. Despite this, Defendants argue that Plaintiff surprisingly conveyed the loan to Plaintiff. Ultimately, Defendants are arguing that Romspen and Plaintiff – potentially in concert – prevented Defendants from satisfying the requirements under the Loan Documents, thus causing the default. (See Defendant Brief at 13-14)

Defendants maintain that Romspen had not acted properly under the Loan Agreement and then conveyed the Loan to Plaintiff, who in turn declared default. This argument assumes Defendants' rights under the Loan Agreement were breached by Romspen's failure to provide certain funding from the Interest Reserve. Yet, § 6.1.2 of the Loan Agreement states

> Notwithstanding the foregoing, in the event the Borrower has not obtained, within eight (8) months from the date hereof (i) final nonappealable approval from the Borough of Edgewater's Zoning Board of Adjustment . . . and (ii) final approval from the New Jersey Department of Environmental Protection for the Project, Lender shall not be required to make any additional disbursements from the Interest Reserve.

This section provides that the Lender has the authority to suspend disbursements upon Defendants' failure to obtain non-appealable approval from the Edgewater Zoning Board and final approval from the New Jersey Department of Environmental Protection. Moreover, the Loan Agreement provides that Lender's delay or failure to exercise any right shall not operate or constitute a waiver thereof. Based on the foregoing, it does not appear that Defendants had rights which Plaintiff may have interfered with. Even if the pertinent section of the Loan Agreement accorded Defendants rights, the actions which had caused the delays resulting in Defendants' inability to meet the monthly debt service payments were those of another entity, not Plaintiff. See Klingbeil Holding Co., 137 N.J. Super. at 356.

Moreover, Defendants point out that three appeals of the Edgewater Zoning Board's approval were filed. Yet, Defendants only specify that SoJo Spa was one of the appealing parties

and allege that it is also a tenant of Plaintiff/Plaintiff's principal. However, Plaintiff provides the certificate of formation for SJ 660 LLC, whose main business address and registered office is the same as SoJo Spa's address. (See Jonathan R. Vender Certification Ex. B) In addition, Plaintiff includes SJ 660 LLC's complaint in lieu of prerogative writs which states that SJ 660 LLC is the owner of SoJo Spa. (See Jonathan R. Vender Certification Ex. A) As part of its complaint, SJ 660 LLC asserted that SoJo Spa's view of the New York City skyline is one of its most attractive features which would be obstructed by Defendant's proposed application. Furthermore, Defendants do not take issue or allege any wrongdoing on the parts of the other parties who appealed the Edgewater Zoning Board's approval. Both the Borough of Cliffside Park and a non-party individual appealed the approval obtained by Defendants. However, according to Defendants' allegation that SoJo Spa is a tenant of Plaintiff's principal, there must be inequitable conduct on the part of Romspen and possibly Plaintiff. Defendants provide nothing to indicate any connection between Plaintiff, SJ 660 LLC, and Romspen. Even if Plaintiff or Romspen were involved in SJ 660 LLC's complaint, two other complaints were filed, meaning the delay was bound to occur. It is not alleged in any way that Plaintiff or its principal have any connection to these other appealing parties. Therefore, Defendants would still default under § 6.1.2 of the Loan Agreement.

Under New Jersey law, "where the terms of a contract are clear and unambiguous, there is no room for interpretation or construction and the courts must enforce those terms as written." Risikatv Olajide v. One Main Financial, 2017 WL 2705413 (App. Div. June 23, 2017) (internal citations omitted). When presented with an unambiguous contract, the court should not look outside the "four corners" of the contract to determine the parties' intent, and parol evidence should not be used to alter the plain meaning of the contract. "The court has no right to rewrite the contract

merely because one might conclude that it might well have been functionally desirable to draft it differently." Connecticut General Life Ins. Co. v. Punia, 884 F. Supp. 148, 152 (D.N.J. 1995) (internal citations omitted).

The Loan Agreement in this matter is clear as to Defendants' obligations under the Loan Documents. Defendants agreed that in order to continue to receive disbursements from the Interest Reserve, they must obtain certain approvals within an eight-month period. As a result of several outside actors, Defendants were unable to do so. Pursuant to the Loan Agreement, Romspen could then cease interest payment distributions. While it is not explicitly requested that the Loan Agreement be read a certain way, the agreement is unambiguous as to what Defendants' obligations were. Here, Defendants did not satisfy the obligations they agreed to, thereby defaulting.

Significantly, Plaintiff was not involved in the underlying loan documents. In Murphy Prop. Acquisition, LLC v. Pfister Chem. Inc., the court stated,

> Here, however, Plaintiff was not even involved in the underlying loan documents, and therefore could not have interfered with Defendant's rights under the original agreement. In other words, Defendant's allegations that Plaintiff failed to disclose to Defendant that the loan had been assigned and that Plaintiff was "scheming" to acquire the property at a below market price are immaterial to the matter at hand, because such allegations do not relate to the inception of the loan. Plaintiff was not a party to the original transaction, and that fact is uncontested. Therefore, Defendant's reliance on Leisure Technology is inconsistent with the facts in the underlying litigation, and as a result, Defendant's bold assertion of unclean hands does not rise to the level of a valid defense or counterclaim germane to the foreclosure action.

2019 N.J. Super. Unpub. LEXIS 1483 at 12-13 (emphasis added). Indeed, Defendants must establish the defense of unclean hands by proving inequitable conduct by Lender at the inception of the loan. See id. "The unclean hands' doctrine is applicable only to cases where the particular claim is tied up to inequitable conduct as an element of its creation." Neubeck v. Neubeck, 94 N.J.

Eq. 167, 171 (E. & A. 1922). Defendants are not claiming that Romspen engaged in inequitable conduct at the inception of the mortgage loan which tainted it, thereby constituting a challenge to the validity or enforceability of the mortgage instrument itself. Instead, it is baldly asserted that Romspen and Plaintiff acted in concert to prevent Defendants from satisfying the requirements under the Loan Documents causing the default. This argument does not address or even point to any possible instances of inequitable conduct on the part of Plaintiff which may occurred at the time Defendants executed the Loan Documents in favor of Romspen.

Lastly, R. 4:64-5 states "claims for foreclosure of mortgages shall not be joined with non-germane claims against the mortgagor or other persons liable on the debt." In other words, a party may only plead germane counterclaims and cross-claims in a foreclosure action with leave of court. R. 4:64-5. As stated above, while unclean hands is a cognizable defense in a foreclosure action, it rises to a germane claim if the particular claim asserts inequitable conduct as an element of the creation of the underlying loan documents. Here, Defendants' alleged counterclaim only touches on alleged conduct by Romspen and a third-party uninvolved in this litigation. In addition, this matter does not sit on the same fact set as in Leisure Tech.-Ne., Inc. v. Klingbeil Holding Co., as Plaintiff here was not a party to the underlying transaction. See 137 N.J. Super. 353, 358 (App. Div. 1975).

Importantly, Defendants' Answer baldly asserts the defense of unclean hands. This is done in a manner that fails to adequately challenge the three material issues of a foreclosure action. Nearly one year after the filing of the Contesting Answer, Defendants asserted the defense of unclean with insufficient detail. At this point in the foreclosure proceeding, it would be prejudicial to permit the filing of a counterclaim, especially one that does not point to inequitable conduct by Plaintiff at the inception of the loan documents. Thus, Defendants' defenses do not touch on the

essential elements of a foreclosure action nor is the proposed counterclaim germane.

As a result, pursuant to R. 4:64-5, Defendants' remedy, if any, lies in a separate Law Division action which may brought without prejudice to the entire controversy doctrine.

Based on the foregoing, Plaintiff's Motion to Strike Answer is granted. Defendants' Answer shall be stricken as non-contesting as it fails to constitute a proper challenge to the validity and priority of Plaintiff's lien. In addition, Defendants' Cross-Motion for Leave to File a Counterclaim is denied.

This matter is to return to the Office of Foreclosure and proceed accordingly.

An Order accompanies this decision.