

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

NEW YORK BUSINESS DEVELOPMENT
CORPORATION,

Plaintiff,

- against -

JBECKS PROPERTIES, INC., JBECKS
RESTAURANT, LLC, JOHN A. BECK, KATHY
BECK, NEW YORK, STATE DEPARTMENT OF
TAXATION AND FINANCE, TOWN OF
CHEEKTOWAGA, and JOHN/JANE DOE (such
designation intending to refer to any and all other
individuals occupying the subject premises and/or
claiming any interest whatsoever in such premises),

Defendants.

**AFFIRMATION IN
SUPPORT OF MOTION
FOR DEFAULT
JUDGMENT, THE
APPOINTMENT OF A
REFEREE TO COMPUTE,
AND TO AMEND THE
CAPTION**

Index No.: 803368/2018

Property Address:
1500 Cleveland Drive
Cheektowaga, NY 14225

MEGHAN M. BREEN, ESQ. an attorney at law, affirms under pain and penalty of perjury as follows:

1. I am an attorney licensed to practice before the Courts of the State of New York, and am associated with the law firm of Lemery Greisler LLC, the attorneys for the Plaintiff New York Business Development Corporation (“NYBDC” or “Plaintiff”).

2. I am fully familiar with the facts and circumstances set forth herein based upon my review of the file documents and based upon my involvement in this matter to date.

3. This is an action to foreclose a **commercial** mortgage on real property located in Erie County, New York, and does not involve a “home loan” as such term is defined by Section 1304 of the Real Property Actions and Proceedings law.

4. I make this Affirmation in support of Plaintiff’s motion for an Order (i) granting Plaintiff default judgment pursuant to CPLR § 3215 against all of the Defendants, (ii) appointing a referee pursuant to RPAPL § 1321 to compute the amount due the Plaintiff and to ascertain

whether the Mortgaged Premises should be sold in one parcel, (iii) amending the caption to include as a Defendant the entity occupying the Mortgaged Premises, and (iv) for such other and further relief as to this Court deems just and proper.

PROCEDURAL HISTORY

5. This action was commenced by the filing of a Summons, Verified Foreclosure Complaint, and Notice of Pendency with the Erie County Clerk's Office on March 1, 2018 (*see* Summons, Notice of Pendency, and Verified Foreclosure Complaint (without exhibits) annexed as **Exhibit 1** hereto).

6. On March 27, 2018, NYBDC filed an Amended Verified Foreclosure Complaint (the "Amended Complaint"), within the period set forth under CPLR R. 3025(a), to make the complaint abundantly clear that NYBDC is foreclosing three parcels (two tax map parcels) referenced in the Mortgage, which includes commercial property that holds the restaurant, an adjacent residential property, and to foreclose a leasehold interest in property included with the lien of the Mortgage (*see* Amended Complaint with exhibits, annexed as **Exhibit 2** hereto).

7. The Summons, Amended Complaint, and Notice of Pendency shall be referred to as the "Pleadings."

8. As more specifically set forth in the accompanying affidavit of Timothy Brosnan, sworn to on June 7, 2018 (the "Brosnan Aff."), this is an action brought pursuant to RPAPL § 1301 *et seq.* to foreclose a mortgage encumbering the three parcels labeled "A," "B," and "E" in the Mortgage and as set forth in the Notice of Pendency, commonly known as 1500 Cleveland Drive, Cheektowaga, NY 14225, which properties are identified on the tax map for the Town of Cheektowaga at numbers 92.05-1-15 and 92.05-1-14 (the "Mortgaged Premises").

9. The Pleadings were served on all Defendants, and afterward the relevant Defendants

were served with CPLR § 3215 notices. Copies of all affidavits of service are collectively annexed as **Exhibit 3** hereto, and the copies of all relevant CPLR 3215 notices and affidavits of additional mailings are collectively annexed as **Exhibit 4** hereto.

10. Specifically, JBecks Properties, Inc. was served with copies of the Pleadings on March 30, 2018 by delivering a true copy of each to the Office of the Secretary of State, State of New York (*see* Exhibit 3 hereto).

11. Pursuant to CPLR § 3215(g)(4), an additional copy of the Summons was mailed to JBecks Properties, Inc. on April 25, 2018 at its last known address via first class mail in an envelope bearing the legend “Personal and Confidential” (*see* Exhibit 4 hereto).

12. Defendant JBecks Restaurant LLC was served with copies of the Pleadings on March 30, 2018 by delivering a true copy of each to the Office of the Secretary of State, State of New York (*see* Exhibit 3 hereto).

13. Pursuant to CPLR § 3215(g)(4), an additional copy of the Summons was mailed to JBecks Restaurant LLC on April 25, 2018 at its last known address via first class mail in an envelope bearing the legend “Personal and Confidential” (*see* Exhibit 4 hereto).

14. Defendant John A. Beck was personally served with a copy of the Pleadings and the Help for Homeowners in Foreclosure and Notice to Tenants pursuant to RPAPL § 1303 on April 5, 2018 pursuant to CPLR § 308(1) (*see* Exhibit 3 hereto).

15. Pursuant to CPLR § 3215(g)(3), an additional copy of the Summons was mailed to John A. Beck on April 25, 2018 at his last known address via first class mail in an envelope bearing the legend “Personal and Confidential” (*see* Exhibit 4 hereto).

16. Defendant Kathy Beck was served with copies of the Pleadings and the Help for Homeowners in Foreclosure and Notice to Tenants pursuant to RPAPL § 1303 on April 5, 2018

by delivering the Pleadings to her husband, John A. Beck, a person of suitable age and discretion, pursuant to CPLR § 308(2) followed by service of first class mail on April 5, 2018 at the same address (*see* Exhibit 3 hereto).

17. Pursuant to CPLR § 3215(g)(3), an additional copy of the Summons was mailed to Kathy Beck on April 25, 2018 at his last known address via first class mail in an envelope bearing the legend “Personal and Confidential” (*see* Exhibit 4 hereto).

18. The Help for Homeowners in Foreclosure and Notice to Tenants was served on Mr. and Mrs. Becks notwithstanding the fact that the mortgage loan being foreclosed is not a home loan but, rather, is a commercial loan.

19. Defendant New York State Department of Taxation & Finance (“N.Y. Tax”) was served with copies of the Pleadings on April 3, 2018 through service on a Secretary at N.Y. Tax, Andrea Lounello (*see* Exhibit 3 hereto).

20. Defendant Town of Cheektowaga was served with copies of the Pleadings on April 5, 2018 through service upon the Town Clerk, Vickie Dankowski (*see* Exhibit 3 hereto).

21. On April 9, 2018, attorney Jennifer Ann Runfola appeared in this action for the Town of Cheektowaga, however, the Notice of Appearance was returned by the Erie County Clerk’s Office for correction and we are unable to access and print a copy. Ms. Runfola is receiving electronic notifications through the NYSCEF system.

22. Defendant John Doe, now known to NYBDC as Mr. Bills Bar, was also served with copies of the Pleadings and the Help for Homeowners in Foreclosure and Notice to Tenants pursuant to RPAPL § 1303 on April 5, 2018 through service upon Carrie King, a Manager and Authorized Agent of Mr. Bills Bar (*see* Exhibit 3 hereto).

23. Pursuant to CPLR § 3215(g)(4), an additional copy of the Summons was mailed to

Mr. Bills Bar on April 25, 2018 at the Mortgaged Premises via first class mail in an envelope bearing the legend “Personal and Confidential” (*see* Exhibit 4 hereto).

24. NYBDC and Defendant Borrowers and Guarantor (as defined in the Brosnan Aff.) entered into a Forbearance Agreement, dated April 15, 2018, pursuant to which, among other things, Borrowers agreed that this action could proceed to judgment, that Borrowers will make continued payments to NYBDC, including making payments on a tax escrow, and NYBDC agreed not to notice a foreclosure sale if the Borrowers remain current on their obligations. A copy of the Forbearance Agreement is annexed hereto as **Exhibit 5**.

25. Pursuant to the terms of the Forbearance Agreement, Borrowers and Guarantor specifically agreed that “[w]ith respect to the Foreclosure Action the Lender may, in its sole discretion, prosecute the action up through and including entry of judgment. Borrower and Guarantor shall not contest the Foreclosure Action. Borrowers and Guarantor admit and acknowledge good and proper service of the Amended Verified Foreclosure Complaint.” *See* Exhibit 5, ¶ 7.

26. The forbearance period will last through the expiration date, which is March 15, 2020, at which time, Borrowers must either pay the loan in full or NYBDC will be entitled to proceed with a sale of the Mortgaged Premises. NYBDC may also continue with a sale of the Mortgaged Premises in the event of default under the Forbearance Agreement.

PLAINTIFF’S MOTION FOR DEFAULT JUDGMENT AND OTHER REQUESTED RELIEF

27. None of the Defendants have served or filed an answer to the Amended Complaint despite the fact that their time to serve an answer has passed and all defendants are in default with regard to same. Indeed, as discussed above, the Borrowers and Guarantor agreed that as to them service was proper and agreed not to contest this action.

28. Upon information and belief, none of the Defendants is an infant, incompetent or absentee.

29. Upon information and belief and after due diligence having been done, none of the Defendants are presently in the Military Service of the United States Government.

30. It is respectfully submitted that there are no defenses to the cause of action for foreclosure of the commercial Mortgage described in the Amended Complaint. The proceedings in this action have been regular in all respects.

31. The Mortgages Premises consists of two tax map parcels.

32. The Mortgage, Note and Guarantee all provide that NYBDC and/or Guarantor shall be responsible for NYBDC's reasonable attorneys' fees, costs and expenses associated with enforcing NYBDC's rights under said instruments, as well as all costs incurred by NYBDC in performing any of Borrower's obligations thereunder. NYBDC has and will incur attorneys' fees, and other costs and expenses, in connection with the prosecution of this action, the specific amount of which will be supplied by NYBDC when it bring its motion for a judgment of foreclosure and sale.

33. No previous application for the relief herein sought has been made to any court or judge.

34. Based upon the foregoing, it is respectfully submitted that this Court should not hesitate to issue an Order granting default judgment against all the Defendants herein for the relief sought in the Amended Verified Complaint.

35. Plaintiff is also entitled to the appointment of a referee to compute pursuant to RPAPL §1321.

36. Since commencing the action, Plaintiff has learned the identity of the business

occupying the Mortgaged Premises. Mr. Bills Bar was served with the Pleadings as the “John/Jane Doe.”

37. As such, Plaintiff seeks an Order from the Court amending the caption to remove the John/Jane Doe reference and to include Mr. Bills Bar as the known occupant of the Mortgaged Premises. Plaintiff also erroneously included a comma after New York in the name of Defendant New York State Department of Taxation & Finance and seeks to remove it.

38. Plaintiff proposes that the amended caption should read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

NEW YORK BUSINESS DEVELOPMENT
CORPORATION,

Plaintiff,

Index No.: 803368/2018

- against -

JBECKS PROPERTIES, INC., JBECKS
RESTAURANT, LLC, JOHN A. BECK, KATHY
BECK, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, TOWN OF
CHEEKTOWAGA, and MR. BILLS BAR

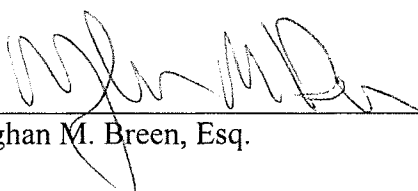
Property Address:
1500 Cleveland Drive
Cheektowaga, NY 14225

Defendants.

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WHEREFORE, based upon the foregoing, your affiant respectfully requests that this Court issue an Order (i) granting a default judgment against the Defendants herein pursuant to CPLR § 3215, (ii) appointing a referee to compute the amount due the Plaintiff pursuant to RPAPL § 1321 and to ascertain whether the Mortgaged Premises should be sold in one parcel, (iii) amending the caption to include as Defendant the entity occupying the Mortgaged Premises, and (iv) for such other and further relief as to this Court seems just and proper.

DATED: June 7, 2018
Albany, New York



Meghan M. Breen, Esq.