

PART 19

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

CMN

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

-----X

1894 EASTCHESTER CORP.

Index No. 0380187/2010

- against -

Hon. LUCINDO SUAREZ,

Justice.

1894 EAST, LLC, et al

-----X

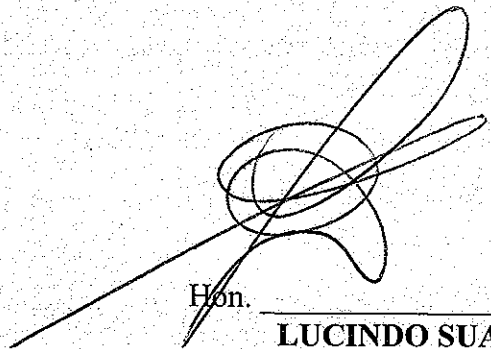
The following papers numbered 1 to 12 read on this motion, MISCELLANEOUS

Noticed on May 30, 2010 and duly submitted as No. 5 on the Motion Calendar of June 25, 2012

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2, 3, 4	
Notice of Cross-Motion - Order to Show Cause - Exhibits and Affidavits Annexed	6, 7, 8, 9	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits	10, 11, 12	
Sur-replying Affidavit and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law	5	

Upon the foregoing papers, plaintiff's motion seeking dismissal of the counterclaim asserted against it and defendant's motion seeking dismissal of the complaint are disposed of, in accordance with the annexed decision and order.

Dated: 06/26/2012



Hon.

LUCINDO SUAREZ, J.S.C.

PART 19

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

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Index No. **0380187/2010**

- against -

Hon. **LUCINDO SUAREZ,**

Justice.

1894 EAST, LLC, et al
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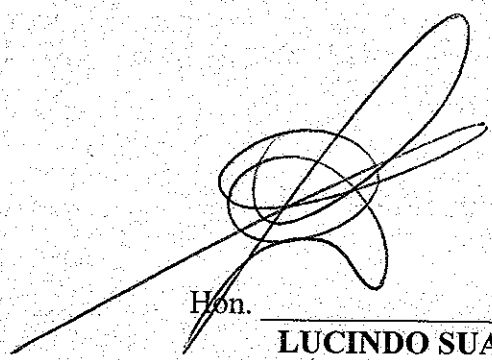
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Upon the foregoing papers, plaintiff's motion seeking dismissal of the counterclaim asserted against it and defendant's motion seeking dismissal of the complaint are disposed of, in accordance with the annexed decision and order.

Dated: **06/26/2012**



Hon.

LUCINDO SUAREZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

-----X
1894 EASTCHESTER ROAD CORP.,

Plaintiff,

DECISION AND ORDER

Index No. 380187/2010

- against -

1894 EAST LLC, 31-35 CARROLL STREET LLC,
GERALD CHRISTOPHER d/b/a GOOD TO GO
RESTAURANT and EXCELLENT PHYSICAL
THERAPY, P.C.,

Defendants.
-----X

PRESENT: Hon. Lucindo Suarez

Upon the order to show cause signed May 9, 2012 and the affirmation, affidavit, exhibits and memorandum of law submitted in support thereof; the notice of cross-motion dated May 18, 2012 of defendant Gerald Christopher d/b/a Good to Go Restaurant and the affirmation, affidavit and exhibits submitted in support thereof; plaintiff's reply affirmation dated June 11, 2012 and the affidavit and exhibits annexed thereto; the reply affirmation dated June 20, 2012 of defendant Gerald Christopher d/b/a Good to Go Restaurant; and due deliberation; the court finds:

In this mortgage foreclosure action, plaintiff mortgagee 1894 Eastchester Road Corp. moves by order to show cause for an order dismissing the counterclaim of defendant Gerald Christopher d/b/a Good to Go Restaurant ("Christopher") or in the alternative extending plaintiff's time to reply to the counterclaim. Christopher, a commercial tenant at the subject premises, cross-moves for an order dismissing plaintiff's supplemental complaint on the ground that the mortgage has been satisfied and for a default judgment against plaintiff on his counterclaim. The court declines to consider defendant's June 20, 2012 reply affirmation as it is unsigned and lacks an affirmation or affidavit of service.

Plaintiff submits an affidavit from its principal, Ellyn Bank ("Bank"), who states that plaintiff

has discontinued its foreclosure action against defendant mortgagors 1894 East LLC and 31-35 Carroll Street LLC because the mortgage has been satisfied. Annexed to the moving papers is a copy of the bargain and sale deed executed October 7, 2011, which was recorded in the Office of the City Register on October 25, 2011, and a copy of the settlement agreement between plaintiff and defendant mortgagors. The court notes that no notice or stipulation of discontinuance has been filed. *See* CPLR 3217. In his affidavit, Christopher states that plaintiff's complaint should be dismissed in its entirety since the foreclosure action is now moot. Plaintiff does not oppose that portion of the cross-motion seeking to discontinue the action.

Christopher, though, has asserted a counterclaim against plaintiff, seeking to recover six hundred thousand dollars in renovation costs incurred as a result of plaintiff's failure to notify or join him as a party when it commenced the instant foreclosure action. Plaintiff submits that the counterclaim is baseless on the grounds that (1) the foreclosure action between plaintiff and defendant mortgagors has resolved and (2) damages based upon presupposed future loss is not justiciable.

In assessing a motion to dismiss, the court must accept the allegations in the complaint as true and afford plaintiff every favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87, 638 N.E.2d 511, 514, 614 N.Y.S.2d 972, 974 (1994). On a dismissal motion pursuant to CPLR 3211(a)(7), the court may also "consider affidavits submitted by the [non-moving party] to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Dollard v. WB/Stellar IP Owner, LLC*, 2012 N.Y. App. Div. LEXIS 4718, at *1 (1st Dep't June 14, 2012). Christopher, a tenant at the premises, was not an indispensable party to the foreclosure proceeding. *See Balt v. J.S. Funding Corp.*, 230 A.D.2d 699, 646 N.Y.S.2d 50 (2d Dep't 1996). He was joined as a necessary party as his lease was subordinate to plaintiff's mortgage. *See* CPLR 1311. If the action had proceeded without him, his rights would have remained unaffected by

a judgment of foreclosure and sale. *See Ridge Realty LLC v. Goldman*, 263 A.D.2d 22, 701 N.Y.S.2d 69 (2d Dep't 1999).

Here, plaintiff submits that Christopher is still in possession of the premises and both parties agree the property is no longer in foreclosure. It also appears through the parties' submissions that the leasehold has continued even after the defendant mortgagors transferred the property, thus negating Christopher's claim for damages due to plaintiff's failure to join him in the foreclosure proceeding. Christopher has proffered no additional factual allegations supporting his claim to recover renovation costs due to plaintiff's failure to join him as a party to the foreclosure proceeding. To the extent that Christopher claims he was harassed by plaintiff, New York does not recognize a cause of action for harassment. *See Jacobs v. 200 E. 36th Owners Corp.*, 281 A.D.2d 281, 722 N.Y.S.2d 137 (1st Dep't 2001); *Board of Managers of Exec. Plaza Condo. v. Jones*, 251 A.D.2d 89, 674 N.Y.S.2d 304 (1st Dep't), *appeal dismissed*, 92 N.Y.2d 1002, 706 N.E.2d 1212, 684 N.Y.S.2d 188 (1998).

The court declines to award Christopher attorneys' fees incurred in defending this action. *See Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 548 N.E.2d 903, 549 N.Y.S.2d 365 (1989).

Accordingly, it is

ORDERED, that in light of the resolution of the foreclosure action, the motion of plaintiff seeking, *inter alia*, dismissal of the counterclaim is granted to the extent of dismissing the counterclaim of defendant Gerald Christopher d/b/a Good to Go Restaurant, and the balance of the motion otherwise denied; and it is further

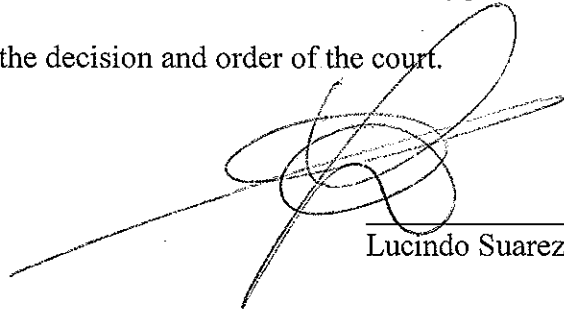
ORDERED, that the cross-motion of defendant Gerald Christopher d/b/a Good to Go Restaurant seeking, *inter alia*, dismissal of plaintiff's complaint is granted to the extent of dismissing plaintiff's complaint, and the balance of the cross-motion otherwise denied; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff 1894 Eastchester Corp. dismissing the counterclaim of defendant Gerald Christopher d/b/a Good to Go Restaurant asserted against it; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Gerald Christopher d/b/a Good to Go Restaurant dismissing plaintiff's complaint against it.

This constitutes the decision and order of the court.

Dated: June 26, 2012



Lucindo Suarez, J.S.C.