

<b>Sovereign Bank v DiTomasso</b>
2015 NY Slip Op 30117(U)
January 9, 2015
Supreme Court, Suffolk County
Docket Number: 32400/2010
Judge: William B. Rebolini
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK****I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**  
**Justice**

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Sovereign Bank  
601 Penn Street  
Reading, PA 19604,

Motion Sequence No.: 002; MG

Motion Date: 10/18/13

Submitted: 10/15/14

Plaintiff,

Index No.: 32400/2010

-against-

Attorneys/Parties [See Rider Annexed]

Michael DiTomasso, Danielle DiTomasso,  
Capital One Bank USA, N.A., Citibank, N.A.,  
South Beach Property Owners Association,

John Doe (Said name being fictitious, it being the  
intention of Plaintiff to designate any and all  
occupants of premises being foreclosed herein, and  
any parties, corporations or entities, if any, having  
or claiming an interest or lien upon the mortgaged  
premises.)

Defendant.  

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Upon the following papers numbered 1 to 18 read upon this motion for summary judgment and order of reference: Notice of Motion and supporting papers, 1 - 18; it is

**ORDERED** that this motion by plaintiff Sovereign Bank, pursuant to CPLR 3212 for an order granting summary judgment on its verified complaint, fixing the defaults as to non-answering, non-appearing defendants, for leave to amend the caption of this action pursuant to CPLR 3025 (b) and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

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**ORDERED** that the caption is hereby amended to correctly reflect defendant South Beach Property Owners Association as Sound Beach Property Owners Association, by reflecting the plaintiff as Sovereign Bank, N.A., and by striking therefrom the names of the remaining defendants "John Doe #1" through "John Doe #12"; and it is further

**ORDERED** that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

**ORDERED** that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

\_\_\_\_\_  
Sovereign Bank, N.A.,

x

Plaintiff,

- against -

Michael DiTomasso, Danielle DiTomasso,  
Capital One Bank USA, N.A., Citibank, N.A.,  
Sound Beach Property Owners Association,

Defendants.

\_\_\_\_\_  
x

This is an action to foreclose a mortgage on premises known as 19 Meadowbrook Road, Sound Beach, New York. On September 8, 2004, defendant Michael DiTomasso (DiTomasso) executed a note in favor of Sovereign Bank, Federal Savings Bank (Sovereign), agreeing to pay the sum of \$279,150.00 at the yearly interest rate of 5.3750 percent. On the same date, defendant DiTomasso executed a first mortgage in the principal sum of \$279,150.00 on the subject property. The mortgage was recorded on September 18, 2004 in the Suffolk County Clerk's Office. Thereafter on April 15, 2009, defendant DiTomasso executed a modification agreement modifying the note and mortgage to reflect, *inter alia*, a new unpaid principal sum of \$278,926.66 and fixed rate interest at 5.25 percent. The modification agreement was recorded on January 14, 2010 in the Suffolk County Clerk's Office.

A notice of default dated July 21, 2010 was sent to defendant DiTomasso stating that he had defaulted on his mortgage loan and that the amount past due was \$6,520.24. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on August 31, 2010. In its complaint plaintiff alleges, in pertinent part, that defendant breached his obligations under the

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terms and conditions of the note and mortgage by failing to make monthly payments commencing with the payment due on May 1, 2010. Defendants Michael DiTomasso and Danielle DiTomasso interposed an answer with three affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on January 10, 2011 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendant DiTomasso failed to comply with the terms of the loan agreement and mortgage and, that defendants' general denials and affirmative defenses raised no issues of fact for trial. In support of its motion, plaintiff submits among other things: the sworn affidavit of Kristy Kochenash, banking officer of Sovereign Bank; the affirmation of Kaitlyn Costello, Esq. in support of the instant motion; the affirmation of Kaitlyn Costello, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage and modification agreement; notices pursuant to RPAPL 1320, 1304 and 1303; and, affidavits of service for the summons and complaint.

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (*Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to establish by admissible evidence the existence of a triable issue of fact as to a defense (see *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff produced the note, mortgage and modification agreement executed by defendant DiTomasso, as well as evidence of defendant's nonpayment, thereby establishing a prima facie case as a matter of law (see *Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). Kristy Kochenash, banking officer of Sovereign Bank, avers that defendant DiTomasso failed to comply with the terms of the note and mortgage by failing to make monthly payments commencing with the payment due on May 1, 2010 and subsequent payments thereafter; that by letter dated July 21, 2010, a notice of default was mailed to defendant DiTomasso in accordance with the provisions of the mortgage; and, that a pre-foreclosure notice pursuant to RPAPL 1304 was sent to the borrowers dated January 21, 2010.

Defendants have not submitted opposition to the motion. Defendants' answer is insufficient, as a matter of law, to defeat plaintiff's unopposed motion (see *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, 915 NYS2d 591; *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *Greater N.Y. Sav. Bank v 2120 Realty Inc.*, 202 AD2d 248, 608 NYS2d 463 [1st Dept 1994]). Since no opposition to the instant motion was filed by defendants, no triable issue of fact was raised in response to plaintiff's prima facie showing (see *Flagstar Bank v Bellafiore*,

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94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Wells Fargo Bank Minnesota v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]; *see also Zanfini v Chandler*, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010]).

Based upon the foregoing, the motion for summary judgment is granted against defendants Michael DiTomasso and Danielle DiTomasso. That branch of the motion seeking to fix the defaults as against the remaining defendants who have not answered or appeared herein is granted. Plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is also granted (*see Green Tree Serv. v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed simultaneously herewith as modified by the court.

Dated: 1/9/2015

  
HON. WILLIAM B. REBOLINI, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION \_\_\_X\_\_\_ NON-FINAL DISPOSITION

**RIDER**

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Clerk of the Court

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Sound Beach Property Owners Association  
s/h/a South Beach Property Owners Association  
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