SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 10-01731
PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND MARTOCHE, JJ.

GRAY WOLF CORP., PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

GLEASON ESTATES ASSOCIATES, LP,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

LECLAIR RYAN, ROCHESTER (GREGORY J. MASCITTI OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

      Appeal from an order of the Supreme Court, Monroe County (Kenneth
R. Fisher, J.), entered April 30, 2010 in a foreclosure action. The
order denied the motion of plaintiff for summary judgment and granted
the cross motion of defendant for summary judgment.

      It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by denying defendant's cross motion
and reinstating the complaint and as modified the order is affirmed
without costs.

      Memorandum: Plaintiff commenced this foreclosure action and
thereafter moved for summary judgment on the complaint, and defendant
cross-moved for summary judgment dismissing it. We note at the outset
that Supreme Court properly concluded that defendant was under no
obligation to provide plaintiff with certain annual financial
statements in accordance with the terms of the various documents
executed both between the parties and between the parties and the
United States Department of Housing and Urban Development. We further
conclude that the court properly denied plaintiff's motion for summary
judgment on the foreclosure complaint because, on the record before
us, there is an issue of fact whether defendant was in default (*see
generally Zuckerman v City of New York*, 49 NY2d 557, 562). For that
same reason, however, we conclude that the court erred in granting
defendant's cross motion for summary judgment dismissing the
complaint, and we therefore modify the order accordingly.

Entered: October 7, 2011   Patricia L. Morgan
                                               Clerk of the Court