

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Argued - May 5, 2009

ANITA R. FLORIO, J.P.
HOWARD MILLER
JOSEPH COVELLO
LEONARD B. AUSTIN, JJ.

2008-10031

DECISION & ORDER

Gro-Wit Capital, Ltd., appellant, v Obigor, LLC,
et al., defendants, David Hosten, respondent.

(Index No. 6292/04)

Benjamin H. Segal, New York, N.Y., for appellant.

Firestone & Harris, Brooklyn, N.Y. (Edward M. Rappaport and Alan J. Firestone of counsel), for respondent.

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (F. Rivera, J.), dated September 12, 2008, which granted the renewed motion of the defendant David Hosten pursuant to, inter alia, CPLR 5015(a)(4) to vacate a judgment of the same court entered November 16, 2006, in favor of the plaintiff and against him in the total sum of \$305,499.57, and denied its cross motion to approve the entry of that judgment nunc pro tunc.

ORDERED that the order is affirmed, with costs.

On a prior appeal by the plaintiff in this foreclosure action, this Court reversed an order of the Supreme Court which denied the plaintiff's motion for summary judgment on the issue of liability against the defendant David Hosten, and granted the motion (*see Gro-Wit Capital, Ltd. v Obigor, LLC*, 33 AD3d 859) (hereinafter the prior appeal). Thereafter, without further judicial intervention or approval, the plaintiff secured the entry of a money judgment against Hosten on November 16, 2006. That was improper, as neither this Court's decision and order on the prior appeal, nor any subsequent order of the Supreme Court, awarded the plaintiff that relief.

June 9, 2009

Page 1.

GRO-WIT CAPITAL, LTD. v OBIGOR, LLC

Accordingly, the Supreme Court correctly granted the renewed motion of the defendant David Hosten to vacate the judgment entered November 16, 2006. Furthermore, the Supreme Court properly denied the plaintiff's cross motion to approve the entry of the judgment nunc pro tunc, since the only relief sought against Hosten was equitable in nature, the plaintiff never sought leave to amend its complaint to assert a cause of action to recover damages against Hosten, and the evidence before us does not otherwise demonstrate the plaintiff's entitlement to such damages (*cf.* CPLR 3017[a]).

The plaintiff's remaining contentions are without merit.

FLORIO, J.P., MILLER, COVELLO and AUSTIN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court