

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

D23843  
G/kmg

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Submitted - April 23, 2009

A. GAIL PRUDENTI, P.J.  
HOWARD MILLER  
RANDALL T. ENG  
ARIEL E. BELEN, JJ.

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2008-04940

DECISION & ORDER

Citibank, N.A., etc., respondent,  
v Elvis Herrera, appellant, et al., defendants.

(Index No. 11022/07)

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Joseph R. Sanchez, Great Neck, N.Y., for appellant.

Rosicki, Rosicki & Associates, P.C., Plainview, N.Y. (Andrew Morganstern of counsel), for respondent.

In an action to foreclose a mortgage, the defendant Elvis Herrera appeals from an order of the Supreme Court, Westchester County (Nastasi, J.), dated April 2, 2008, which granted the plaintiff's motion, inter alia, for summary judgment on the complaint and for the appointment of a referee to compute the amount owed to it.

ORDERED that the order is affirmed, with costs.

On appeal, the defendant Elvis Herrera challenges only the plaintiff's standing to commence this action, not the merits of the plaintiff's motion. However, Herrera waived any challenge to the plaintiff's standing by raising this argument for the first time only in opposition to the plaintiff's summary judgment motion, and not in his answer or in a pre-answer motion to dismiss (*see* CPLR 3211[a][3]; [e]; *Matter of Fossella v Dinkins*, 66 NY2d 162, 167-168; *Dougherty v City of Rye*, 63 NY2d 989, 991-992; *HSBC Bank, USA v Dammond*, 59 AD3d 679; *Aames Funding v Houston*, 57 AD3d 808; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239).

PRUDENTI, P.J., MILLER, ENG and BELEN, JJ., concur.

ENTER:



James Edward Pelzer

Clerk of the Court

July 7, 2009

CITIBANK, N.A. v HERRERA