

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

D25232
C/kmg

_____AD3d_____

Argued - November 9, 2009

REINALDO E. RIVERA, J.P.
HOWARD MILLER
THOMAS A. DICKERSON
SHERI S. ROMAN, JJ.

2008-09624

DECISION & ORDER

Hypo Holdings, Inc., appellant, v Herbert F. Feuer,
et al., respondents.

(Index No. 10807/94)

Danzig Fishman & Decea, White Plains, N.Y. (Thomas B. Decea and Yenisey Rodriguez-McCloskey of counsel), for appellant.

Avery J. Gross, Staten Island, N.Y., for respondents.

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Richmond County (Maltese, J.), dated September 4, 2008, which granted the defendants' motion to reject a referee's report and denied its cross motion to confirm the same report.

ORDERED that the order is affirmed, with costs.

The Supreme Court properly rejected the referee's report, as it was based upon inadmissible hearsay evidence. Although the plaintiff sufficiently explained the unavailability of the original documents relating to the defendants' mortgage and note, it failed to produce competent "secondary evidence" that did not offend any other exclusionary rule or policy (*Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643-645). Contrary to the plaintiff's contention, the verified complaint was not admissible as a past recollection recorded, as it was drafted by outside counsel and based solely upon facts contained in a computer database of the nonparty bank that issued the subject mortgage (*see Matter of Phoenix Ins. Co. v Golanek*, 50 AD3d 1148, 1151; *Curran v Port Auth. of N.Y. & N.J.*, 262 AD2d 521; *People v Ramirez*, 112 AD2d 326, 326-327). Additionally, a nonparty witnesses' testimony was insufficient to establish the contents of the missing

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documents, as that witness was unable to accurately recount or recite, from personal knowledge, the contents of the documents (*see Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d at 645-646).

The plaintiff's remaining contention is without merit.

RIVERA, J.P., MILLER, DICKERSON and ROMAN, JJ., concur.

ENTER:

A handwritten signature in cursive script that reads "James Edward Pelzer".

James Edward Pelzer
Clerk of the Court