

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

D30459
W/prt

_____AD3d_____

Argued - February 15, 2011

DANIEL D. ANGIOLILLO, J.P.
CHERYL E. CHAMBERS
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2010-08330
2010-10444

DECISION & ORDER

Horizon Bancorp, respondent, v Jean Francois
Pompee, appellant, et al., defendants.

(Index No. 23300/08)

The Scher Law Firm, LLP, Carle Place, N.Y. (Austin Graff of counsel), for appellant.

Catafago DiLorenzo Kaiser, New York, N.Y. (Steven W. Kaiser of counsel), for
respondent.

In an action to foreclose a mortgage, the defendant Jean Francois Pompee appeals (1), as limited by his brief, from so much of an order of the Supreme Court, Kings County (Dabiri, J.), dated August 13, 2010, as, upon renewal, granted that branch of the plaintiff's motion which was for summary judgment, in effect, on the issue of liability, and denied that branch of his cross motion which was to dismiss the complaint pursuant to CPLR 3211(a)(3), and (2) from an amended order of the same court entered September 22, 2010, which, inter alia, granted the plaintiff's motion for summary judgment on the issue of liability and appointed a referee to compute the amount due and owing to it.

ORDERED that the appeal from so much of the order dated August 13, 2010, as, upon renewal, granted that branch of the plaintiff's motion which was for summary judgment, in effect, on the issue of liability is dismissed, as that portion of the order was superseded by the amended order entered September 22, 2010; and it is further;

March 15, 2011

HORIZON BANCORP v POMPEE

Page 1.

ORDERED that the order dated August 13, 2010, is affirmed insofar as reviewed; and it is further,

ORDERED that the amended order entered September 22, 2010, is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the respondent.

The Supreme Court correctly determined that the plaintiff established its prima facie entitlement to judgment as a matter of law, in effect, on the issue of liability by setting forth evidence of the existence of a promissory note and a related mortgage referable to the subject property, its ownership of the mortgage, and the default of the defendant Jean Francois Pompee (hereinafter the defendant) in his repayment of the obligation memorialized by the note and mortgage (*see Campaign v Barba*, 23 AD3d 327, 327; *Household Fin. Realty Corp. of N.Y. v Winn*, 19 AD3d 545, 546; *Sears Mtge. Corp. v Yaghibi*, 19 AD3d 402, 403).

The defendant contends that Business Corporation Law § 1312(a) prohibits the plaintiff, a Nevada corporation that was without authority to do business in New York when it commenced this action, from maintaining this action. However, the plaintiff resolved any issue with respect to its capacity to maintain this action by filing for and obtaining authority to do business in New York pursuant to Business Corporation Law § 1304(a) (*see Showcase Limousine v Carey*, 269 AD2d 133, *mod* 273 AD2d 20; *Uribe v Merchants Bank of N.Y.*, 266 AD2d 21, 22; *Tri-Terminal Corp. v CITC Indus.*, 78 AD2d 609; *see also Matter of Mobilevision Med. Imaging Servs., LLC v Sinai Diagnostic & Interventional Radiology, P.C.*, 66 AD3d 685, 686).

Since the defendant failed to raise a triable issue of fact in opposition to the plaintiff's prima facie showing of entitlement to judgment as a matter of law, the Supreme Court properly granted the plaintiff's motion for summary judgment, in effect, on the issue of liability.

The defendant's remaining contentions are without merit or have been rendered academic in light of our determination.

ANGIOLILLO, J.P., CHAMBERS, AUSTIN and MILLER, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court