

Midfirst Bank v Speiser
2013 NY Slip Op 32116(U)
August 23, 2013
Sup Ct, Suffolk County
Docket Number: 16460-11
Judge: Ralph Gazzillo
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**SUPREME COURT - STATE OF NEW YORK
IAS PART 6 - SUFFOLK COUNTY**

**PRESENT: Hon. RALPH T. GAZZILLO
Justice of the Supreme Court**

**MOTION DATE 2-7-13
ADJ. DATE _____
Mot. Seq. #001 MG**

MIDFIRST BANK

Plaintiff,

-against-

**BRUCE SPEISER, CAPITAL ONE BANK, MRC
RECEIVABLES CORP. NEW YORK
COMMUNITY BANK SUCCESSOR BY
MERGER TO THE ROSLYN SAVINGS BANK
SUCCESSOR BY MERGER TO ROOSEVELT
SAVINGS BANK, NEW YORK STATE
TAXATION AND FINANCE, SPERRY ASSOCIATES
FEDERAL CREDIT UNION SUCCESSOR BY
MERGER TO SPERRY EMPLOYEES FEDERAL
CREDIT UNION, STATE OF NEW YORK,
SUFFOLK COUNTY CLERK UNITED STATES
OF AMERICA ACTING THROUGH THE
IRS,**

**JOHN DOE (Said name being fictitious, it being
the intention of Plaintiff to designate any and all
occupants of premises being foreclosed herein,
and any parties, corporations or entities, if any,
having or claiming an interest or lien upon the
mortgaged premises.)**

Defendants.

X

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**BRUCE SPEISER
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Brooklyn, N. Y. 11201**

Upon the following papers numbered 1 to 13 read on this motion for summary judgment and an order of reference;
Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; ~~Notice of Cross Motion and supporting papers~~
~~_____~~; Answering Affidavits and supporting papers _____; ~~Replying Affidavits and supporting papers~~ _____
~~_____~~; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers,
the motion is decided as follows: it is

ORDERED that this unopposed motion by plaintiff, Midfirst Bank (Midfirst), for summary judgment on its complaint against defendants Bruce Speiser (Speiser), New York State Department of Taxation and Finance and United States of America acting through the IRS; striking the answer of defendant Speiser; entering a default judgment against the non-appearing non-answering defendants Capital One Bank, MRC Receivables Corp., New York Community Bank successor by merger to the Roslyn Savings Bank successor by merger to Roosevelt Savings Bank, Sperry Associates Federal Credit Union successor by merger to Sperry Employees Federal Credit Union, State of New York and the Suffolk County Clerk, for leave to amend the caption pursuant to CPLR 3025 (b) by striking the names of defendant "John Doe"; and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that the caption is hereby amended by striking the names of defendants "John Doe"; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK**

MIDFIRST BANK

Plaintiff,

-against-

**BRUCE SPEISER, CAPITAL ONE BANK, MRC
RECEIVABLES CORP. NEW YORK
COMMUNITY BANK SUCCESSOR BY
MERGER TO THE ROSLYN SAVINGS BANK
SUCCESSOR BY MERGER TO ROOSEVELT
SAVINGS BANK, NEW YORK STATE
TAXATION AND FINANCE, SPERRY ASSOCIATES
FEDERAL CREDIT UNION SUCCESSOR BY
MERGER TO SPERRY EMPLOYEES FEDERAL
CREDIT UNION, STATE OF NEW YORK,
SUFFOLK COUNTY CLERK UNITED STATES
OF AMERICA ACTING THROUGH THE
IRS,**

Defendants.

x

This is an action to foreclose a mortgage on premises known as 19 Vega Drive, Lake Ronkonkoma, New York. On November 13, 1995, defendant Bruce Speiser (Speiser) executed a note in favor of United Northern Mortgage Bankers, Ltd. (United) agreeing to pay the sum of \$140,650.00 at the yearly rate of 8.75 percent. On November 13, 1995, defendant Speiser executed a first mortgage in favor of plaintiff in the principal sum of \$140,650.00 on the subject property. The mortgage was recorded on December 6, 1995 in the Suffolk County Clerk's Office. Thereafter, the mortgage and

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note were transferred by an assignment of mortgage dated November 13, 1995 from United to BancBoston Mortgage Corporation (BancBoston). The assignment was recorded on December 14, 2002 with the Suffolk County Clerk's Office. By way of an amendment to the Articles of Incorporation of BancBoston, effective May 1, 1996, the name of the corporation was changed to Homeside Lending, Inc. Thereafter, on May 31, 2002 the mortgage and note were transferred from Homeside to Midfirst, the plaintiff herein. The mortgage was subsequently modified by a mortgage and loan modification agreement dated December 4, 2009 in the amount of \$10,182.19 to form a single lien in the amount of \$125,924.54. The modification agreement was recorded on January 21, 2010 with the Suffolk County Clerk's Office. The note contains the indorsement by Don Giorgio, president of United, transferring the note to BancBoston and the indorsement in blank of Evera Bell, vice president of BancBoston.

Midland Mortgage Co. Delinquency Service Center, servicer of the loan, sent a notice of default dated October 15, 2010 to defendant Speiser stating that he had defaulted on his mortgage loan and that the amount past due was \$11,754.85. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on May 24, 2011. In its complaint, plaintiff alleges in pertinent part that defendant breached his obligations under the terms of the note and mortgage by failing to make his monthly payments commencing with the July 1, 2010 payment. Defendant Speiser answered by interposing a denial with two affirmative defenses.

The affirmation of Matthew Russel, Esq. indicates that a foreclosure settlement conference was held on September 2, 2011 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendant Speiser breached his obligations under the terms of the loan agreement and mortgage by failing to tender monthly payments commencing with his July 1, 2010 payment and subsequent payments thereafter. In support of its motion, plaintiff submits among other things: the sworn affidavit of David B. Haggard, senior foreclosure litigation specialist for Midfirst; the affirmations of Matthew Russel, Esq.; the affirmations of Matthew Russel, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); the pleadings; the note, mortgage, assignments, and loan modification agreement; a notice of default; notices pursuant to RPAPL §§ 1320, 1304 and 1303; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment motion upon defendants; and a proposed order appointing a referee to compute.

“[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” (*see Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]; *see also Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial of their defenses (*see Aames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d

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533 [2d Dept 2005]; *see also Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Here, plaintiff produced the note, mortgage and loan modification agreement executed by defendant Bruce Speiser, as well as evidence of defendant's nonpayment, thereby establishing a prima facie case as a matter of law (*see Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). David B. Haggard, senior foreclosure litigation specialist for Midfirst, avers that defendant Speiser defaulted on his loan payments commencing with the July 1, 2010 payment; that a letter of default was sent to defendant Speiser on October 15, 2010; and, that on January 19, 2011 plaintiff sent a 90 day default letter in accordance with RPAPL §1304 to defendant Speiser.

Defendants have not submitted opposition to the motion.

Here, the defendant's answer is insufficient, as a matter of law, to defeat the plaintiff's unopposed motion (*see Argent Mtge. Co., LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1st Dept 1996]; *Greater N.Y. Sav. Bank v 2120 Realty Inc.*, 202 AD2d 248, 608 NYS2d 463 [1st Dept 1994]). Since no opposition to the instant motion was filed by defendants Speiser, no triable issue of fact was raised in response to plaintiff's prima facie showing (*see Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; *Wells Fargo Bank Minnesota v Perez*, 41 AD3d 590, 837 NYS2d 877 [2d Dept 2007]).

Based upon the foregoing, the motion for summary judgment is granted against defendants Speiser, New York State Department of Taxation and Finance and United States of America acting through the IRS and the defendant Speiser's answer is stricken.

In addition, plaintiff's application for a default judgment as to the non-appearing defendants Capital One Bank, MRC Receivables Corp., New York Community Bank successor by merger to the Roslyn Savings Bank successor by merger to Roosevelt Savings Bank, Sperry Associates Federal Credit Union successor by merger to Sperry Employees Federal Credit Union, State of New York and the Suffolk County Clerk and for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed simultaneously herewith as modified by the court.

That branch of plaintiff Midfirst's motion seeking leave to amend the caption pursuant to CPLR 3025 (b) is granted as reflected herein.

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Plaintiff is directed to serve a copy of this order amending the caption of this action upon the
Calendar Clerk of this Court

Dated: 8/23/13



A.J. S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION