

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

D80966
O/

____ AD3d ____

Submitted - November 25, 2025

ANGELA G. IANNACCI, J.P.
LINDA CHRISTOPHER
CARL J. LANDICINO
PHILLIP HOM, JJ.

2023-02870

DECISION & ORDER

Apex Bank, etc., appellant, v Theresa D.
Fasulo-Brancalone, et al., respondents,
et al., defendants.

(Index No. 614157/18)

Margolin, Weinreb, and Nierer, LLP, Syosset, NY (Seth D. Weinberg of counsel),
for appellant.

Forchelli Deegan Terrana LLP, Uniondale, NY (Adam L. Browser of counsel), for
respondents.

In an action to foreclose a mortgage, the plaintiff appeals from a judgment of the Supreme Court, Nassau County, dated January 19, 2023. The judgment, upon an order of the same court (David P. Sullivan, J.) entered September 29, 2021, inter alia, granting that branch of the cross-motion of the defendants Theresa D. Fasulo-Brancalone and Peter Brancalone which was for an award of attorneys' fees, and a decision of the same court dated November 7, 2022, is in favor of the defendants and against the plaintiff in the sum of \$57,357.70.

ORDERED that the judgment is reversed, on the law, with costs, that branch of the cross-motion of the defendants Theresa D. Fasulo-Brancalone and Peter Brancalone, Jr., which was for an award of attorneys' fees is denied, the decision dated November 7, 2022, is vacated, and the order entered September 29, 2021, is modified accordingly.

The underlying facts of this appeal are summarized in a related appeal (*Apex Bank v Fasulo-Brancalone*, ____ AD3d ____ [Appellate Division Docket No. 2021-07409; decided herewith]).

In opposition to the plaintiff's motion, among other things, for summary judgment on the complaint and for an order of reference, the defendants Theresa D. Fasulo-Brancalone and Peter Brancalone, Jr. (hereinafter together the defendants), cross-moved, inter alia, for an award of

attorneys' fees. In an order entered September 29, 2021 (hereinafter the September 2021 order), the Supreme Court, among other things, granted that branch of the defendants' cross-motion. On January 19, 2023, upon the September 2021 order, and upon a decision dated November 7, 2022, a judgment was issued in favor of the defendants and against the plaintiff in the sum of \$57,357.70. The plaintiff appeals.

"Real Property Law § 282(1) provides that '[w]henever a covenant contained in a mortgage on residential real property shall provide that . . . the mortgagee may recover attorneys' fees and/or expenses incurred as the result of the failure of the mortgagor to perform any covenant or agreement contained in such mortgage . . . there shall be implied in such mortgage a covenant by the mortgagee to pay to the mortgagor the reasonable attorneys' fees and/or expenses incurred by the mortgagor . . . in the successful defense of any action or proceeding commenced by the mortgagee against the mortgagor arising out of the contract'" (*Deutsche Bank Natl. Trust Co. v Spanos*, 241 AD3d 506, 507-508).

In a related appeal (*see Apex Bank v Fasulo-Brancalone*, _____ AD3d _____ [Appellate Division Docket No. 2021-07409; decided herewith]), this Court determined, among other things, that the Supreme Court should have denied that branch of the defendants' cross-motion which was for summary judgment dismissing the complaint insofar as asserted against them. Since the defendants are no longer prevailing parties for the purpose of Real Property Law § 282, they are not entitled to an award of attorneys' fees for a "successful defense" of this foreclosure action (*id.* § 282[1]; *U.S. Bank Trust, N.A. v Stracci*, 216 AD3d 1048, 1049).

Accordingly, we deny that branch of the defendants' cross-motion which was for an award of attorneys' fees (*see U.S. Bank Trust, N.A. v Stracci*, 216 AD3d at 1049; *Bank of Am., N.A. v Destino*, 138 AD3d 654, 655).

The parties' remaining contentions need not be reached in light of our determination.

IANNACCI, J.P., CHRISTOPHER, LANDICINO and HOM, JJ., concur.

2023-02870

DECISION & ORDER ON MOTION

Apex Bank, etc., appellant, v Theresa D.
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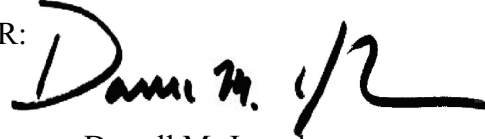
Motion by the respondents to strike stated portions of the appellant's brief on the ground that they refer to matter *dehors* the record. By decision and order on motion of this Court dated April 3, 2024, that branch of the motion which is to strike Point VII of the appellant's brief was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the submission of the appeal, it is

ORDERED that the branch of motion which is to strike Point VII of the appellant's brief is denied.

IANNACCI, J.P., CHRISTOPHER, LANDICINO and HOM, JJ., concur.

ENTER:

A handwritten signature in black ink, appearing to read "Darrell M. Joseph", followed by a long horizontal flourish.

Darrell M. Joseph
Clerk of the Court