STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

FIRST NIAGARA BANK,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 10425-08
RJI NO. 01-09-98356

CAPITAL DISTRICT ENTERPRISES, INC. d/b/a ACME PRESS, CAPITAL DISTRICT ENTERPRISES REALTY, LLC, DAVID B. GIMINIANI, KELLY M. GIMINIANI, PEOPLE OF THE STATE OF NEW YORK AND STATE OF NEW YORK COMMISSIONER OF TAXATION AND FINANCE, and JOHN DOE,

Defendants.

Supreme Court Albany County All Purpose Term, January 5, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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J. Mark Noordsy, Esq.
Attorneys for Plaintiff
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Saratoga Springs, New York 12866

Law Office of Robert J. Rock
Robert J. Rock, Esq.
Attorney for Defendants Capital District Enterprises, Inc. d/b/a Acme Press, Capital District Enterprise Realty, LLC, David B. Giminiani, and Kelly M. Giminiani
60 South Swan Street
Albany, New York 12210

TERESI, J.:

First Niagara Bank (hereinafter "Plaintiff") commenced this action to foreclose two mortgages. Issue was joined by Defendants Capital District Enterprises, Inc. d/b/a Acme Press (hereinafter "Acme"), Capital District Enterprise Realty, LLC (hereinafter "CDER"), David B. Giminiani (hereinafter "Giminiani"), and Kelly M. Giminiani. The People of the State of New

York and State of New York Commissioner of Tax and Finance (hereinafter "the State") filed and served a Notice of Appearance, but did not otherwise answer the complaint. Discovery is ongoing.

Plaintiff now moves for a default judgment, for summary judgment of its foreclosure claim and for a referee to be appointed. Defendants Acme, CDER, Giminani and Kelly Giminiani all oppose the motion. The State was neither served with the motion, in accord with its notice of appearance, nor submits opposition papers thereto. While Plaintiff failed to demonstrate its entitlement to a default judgment, it did demonstrate its entitlement to summary judgment and for the appointment of a referee.

Default Judgment

CPLR §3215(a) authorizes a default judgment "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed." Here, as set forth above, each of the named defendant's either appeared (the State) or plead (Acme, CDER, Giminani and Kelly Giminiani). Moreover, Plaintiff offered no proof of service for the fictitious "John Doe" defendant, which precludes a default judgment from being entered against it. (CPLR §3215[f]). Accordingly, to the extent that Plaintiff seeks a default judgment its motion is denied.

Summary Judgment

"[S]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869 [3d Dept. 1996]).

On a motion for summary judgment, the movant must "make a prima facie showing of entitlement to judgment as a matter of law." (Ferluckaj v. Goldman Sachs & Co., 12 NY3d 316 [2009] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Only if the movant establishes their right to judgment as a matter of law, will the burden then shift to the opponent of the motion to establish the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

"Entitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact." (HSBC Bank USA v. Merrill, 37 AD3d 899, 900 [3d Dept. 2007]; United Cos. Lending Corp. v. Hingos, 283 AD2d 764 [3d Dept.2001]; Charter One Bank, FSB v. Leone, 45 AD3d 958 [3d Dept. 2007]).

On this record, Plaintiff demonstrated its entitlement to judgment as a matter of law. The first mortgage Plaintiff seeks to foreclose was given to it by CDER, on property CDER owns located in Schenectady County, New York (hereinafter "Schenectady Mortgage"). The second mortgage Plaintiff seeks to foreclose was given to it by Giminiani, on property he owns located in Albany County, New York (hereinafter "Albany mortgage"). Plaintiff attached both the Schenectady mortgage and the Albany mortgage to its motion papers. Plaintiff also submits each mortgage's corresponding note and also the note's guarantees. Lastly, Plaintiff's Assistant Vice President's affidavit demonstrated the defendants' defaults under the notes and mortgages. Such affidavit was based upon personal knowledge, and thoroughly explained defendants Acme,

CDER, and Giminani's defaults. As such, Plaintiff demonstrated its entitlement to a judgment of foreclosure as a matter of law.

Similarly, Plaintiff demonstrated its entitlement to judgment against the State. The State's only interest in this litigation is as a "possible holder of liens" on the mortgaged premises. As set forth above, the State served a notice of appearance in this action effectively acknowledging "personal service of a summons." (Resolution Trust Corp. v. Beck, 243 AD2d 307 [1st Dept. 1997]). The notice of appearance did not raise any affirmative defense. Nor did it deny any of the complaint's allegations, which are deemed admitted. (CPLR §3018[a]). As the State admitted each of the complaint's allegations, Plaintiff demonstrated its entitlement to judgment as a matter of law against the State.

With the burden of proof shifted, Defendants Acme, CDER, Giminani and Kelly Giminiani (hereinafter collectively referred to as "Answering Defendants") failed to properly demonstrate the existence of an issue of fact. The Answering Defendants oppose this motion with their attorney's affirmation alone. The attorney does not explain his basis of knowledge for the allegations he makes, rendering the affirmation of "no probative value". (Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324, 325 [1st Dept. 2004]; Chiarini ex rel. Chiarini v. County of Ulster, 9 AD3d 769 [3d Dept. 2004]). Nor is it accompanied by an affidavit of an individual with personal knowledge of the facts. Such submission fails rebut Plaintiff's prima facia showing with competent and admissible evidence demonstrating the existence of an issue of fact. (Root v. Hogan, 3 AD3d 809 [3d Dept. 2004];Ribaudo v. Delaney Const. Corp., 44 AD3d 1143 [3d Dept. 2007]).

Moreover, the Answering Defendant's submission neither contests the validity of the

notes and mortgages attached to Plaintiff's motion, nor denies their default. Rather, the Answering Defendant's attorney's affirmation claims that Plaintiff agreed to finance the purchase of Acme's assets, and Plaintiff's failure to do so creates an issue of fact. Such proposition is speculative, unsupported by any legal basis or admissible proof, and fails to establish the existence of a triable issue of fact.

Accordingly, Plaintiff's motion for summary judgement is granted.

Referee

With Plaintiff's motion for summary judgment granted, a referee must be appointed. (Neighborhood Housing Services of New York City, Inc. v. Meltzer, 67 AD3d 872 [2d Dept. 2009]). Accordingly, Plaintiff may submit a proposed order of reference, referring this matter to a referee to compute pursuant to RPAPL §1321.

This Decision and Order is being returned to the attorneys for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: January 8, 2010
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated October 15, 2009; Affirmation of J. Mark Noordsy, dated October 15, 2009, with attached Exhibits 1-10, Affidavit of Daniel Sager, dated October 14, 2009.
2. Affirmation of Robert Rock, dated November 2, 2009, with attached Exhibit A.