STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

US BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR CITIGROUP MORTGAGE LOAN TRUST,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 6032-09
RJI NO. 01-09-098089

STEVEN F. ENIDES A/K/A STEVEN ENIDES, KARA ENIDES, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR SOUTHSTAR FUNDING, LLC.

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.

Supreme Court Albany County All Purpose Term, February 12, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Charles D.J. Case, Esq.
Steven J. Baum, P.C.
Attorneys for Plaintiff
220 Northpointe Parkway, Suite G
Amherst, NY 14228

Jeremiah F. Manning, Esq.
Attorney for Defendants
49 Oldox Road
Delmar, NY 12054

TERESI, J.:

Plaintiff commenced this action to foreclose the mortgage it holds on property owned by Steven and Kara Enides (hereinafter "Defendants"). Issue was joined by Defendants and

discovery is ongoing. Plaintiff now moves for summary judgment against Defendants, default judgments against the non appearing co-defendant, for the appointment of a referee to compute and to amend the caption of the action. Defendants oppose Plaintiff's motion and their attorney moves for an order authorizing his withdrawal. Because Plaintiff demonstrated its entitlement to judgment as a matter of law and Defendants raised no issue of material fact, Plaintiff's motion for summary judgement is granted. Likewise, Plaintiff also demonstrated its entitlement to a default judgment, to amend the caption of the action and to the appointment of a referee. Defendants' attorney, however, failed to demonstrate his entitlement to withdraw and his motion is denied.

"[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]). "It... is incumbent upon the proponent to tender sufficient evidentiary proof in admissible form to warrant a judgment in its favor." (Salas v. Town of Lake Luzerne, 265 AD2d 770 [3d Dept. 1999]; see CPLR §3212[b] [stating that a summary judgment motion "shall be supported by affidavit, [which] shall be by a person having knowledge of the facts..."]). 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 set forth its entitlement to judgment by producing the note and mortgage, and by demonstrating Defendants' default. Attached to Plaintiff's attorney's affirmation is the initial Note and Mortgage in which Defendants mortgaged the property herein with Wells Fargo Bank NA (hereinafter "Wells Fargo"). Plaintiff further attached Wells Fargo's assignment of the Note and Mortgage to Plaintiff, demonstrating Plaintiff's ownership of the Note and Mortgage. Additionally, Plaintiff demonstrated Defendants' default with the factual allegations of an individual with personal knowledge and upon a review of their business records. Such proof shows that Defendants failed to make their January 1, 2009 payment, that they were provided a default notice due to such nonpayment and have thereafter failed to cure such default by making any payment to Plaintiff. From the foregoing, Plaintiff duly demonstrated its entitlement to judgment as a matter of law, shifting the burden of proof onto Defendants. (Merrill, supra; Hingos, supra).

In opposition, Defendants raised no triable issue of fact. Importantly, Defendants only opposition was submitted by their attorney's unsworn letter, which merely seeks further negotiations. Such submission fails to controvert Plaintiff's showing or raise a triable issue of fact. As such, Plaintiff's motion for summary judgment is granted.

Plaintiff also demonstrated its entitlement to a default judgment and to amend the caption

of the action. Plaintiff submitted an affidavit of service demonstrating its proper service of the Summons and Complaint on Mortgage Electronic Registration Services (hereinafter "MERS"). It further established, its compliance with CPLR §3215 and MERS' default. Accordingly, Plaintiff demonstrated its entitlement to a default judgment against MERS. Additionally, Plaintiff sufficiently demonstrated that the fictitiously named defendants in the caption are unnecessary, as there are no tenants or other occupants that fit the caption's description. Accordingly, the caption of this action is hereby amended to delete the fictitious "JOHN DOE" defendant.

With Plaintiff's motions for summary judgment and default judgment granted, a referee must be appointed. (Neighborhood Housing Services of New York City, Inc. v. Meltzer, 67 AD3d 872 [2d Dept. 2009]; Vermont Fed. Bank v Chase, 226 AD2d 1034 [3d Dept. 1996]; Bank of E. Asia v Smith, 201 AD2d 522 [2d Dept. 1994]). Accordingly, the proposed order of reference that Plaintiff previously submitted is being executed herewith.

Lastly, because Defendants' attorney failed to demonstrate his entitlement to withdrawal, his motion is denied. An attorney may terminate the attorney-client relationship only upon a showing of "good and sufficient cause and upon reasonable notice." (Lake v. MPC Trucking, Inc., 279 AD2d 813, 814 [3d Dept. 2001] quoting In re Dunn, 205 NY 398 [1912]; see also Khan v Dolly, 39 AD3d 649 [2d Dept. 2007]). Or an attorney may withdraw from representation of a client if that "client knowingly and freely assents to termination of the employment." (22 NYCRR 1200.16 [c]). On this record, Defendants' attorney submits no affidavit of service demonstrating "reasonable notice" was provided. Nor did Defendants' attorney properly demonstrate Defendants' consent, as the Defendants' unsworn "Acknowledgment and Consent"

is inadmissible and of no probative value. (United Talmudical Academy of Kiryas Joel v Khal Bais Halevi Religious Corp. 232 AD2d 547 [1996], Slavenburg Corp. v Opus Apparel, Inc., 53 NY2d 799 [1981]).

This Decision and Order is being returned to the attorneys for the Plaintiff. 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: April / , 2010
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated December 1, 200, Affidavit of James Slack, dated October 29, 2009, with attached Exhibits A-K.
2. Notice of Cross Motion, dated December 1, 2009, Affidavit of Jeremiah Manning, dated December 14, 2009, with attached unnumbered exhibit.
3. Affirmation of Charles D.J. Case, dated February 4, 2010.
4. Letter of Jeremiah Manning, dated February 10, 2009.