

**Country Bank v Merrick-Lynbrook LLC**

2010 NY Slip Op 31171(U)

April 29, 2010

Sup Ct, Nassau County

Docket Number: 025344-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**COUNTRY BANK,**

**TRIAL/IAS PART: 22  
NASSAU COUNTY**

**Plaintiff,**

**Index No: 025344-09  
Motion Seq. No: 1**

**-against-**

**Submission Date: 3/11/10**

**MERRICK-LYNBROOK LLC, JONATHAN GREEN,  
CHESKEL WIEDER and JOHN DOE ONE through JOHN  
DOE TWENTY-FIVE,**

**Defendants.**

-----x

**Papers Read on this Motion:**

- Notice of Motion, Affirmation in Support,  
Affidavit in Support and Exhibits.....X**
- Correspondence dated April 28, 2010 and Attachment.....X**

This matter is before the court on the motion filed by Plaintiff Country Bank ("Country" or "Plaintiff") on February 17, 2010 and submitted on March 11, 2010. For the reasons set forth below, the Court 1) grants Plaintiff's motion for summary judgment; 2) grants Plaintiff's motion to amend the caption by striking "John Doe One through John Doe Twenty-Five" from the caption; 3) grants Plaintiff's application for the appointment of a Referee to compute the sum due Plaintiff; and 4) grants Plaintiff's request for permission to make application to the Court, pursuant to RPAPL § 1371, for a judgment against Defendants for any deficiency following the sale of the Mortgage Premises.

**BACKGROUND**

**A. Relief Sought**

Plaintiff seeks an Order 1) pursuant to CPLR § 3212, granting Plaintiff summary judgment against Defendants; 2) appointing a Referee to compute the sum due Plaintiff; and

3) striking “John Doe One through John Doe Twenty-Five” from the caption. Plaintiff also requests that, if the proceeds from the sale of the Mortgage Premises are insufficient to pay the amount due Plaintiff, Plaintiff be permitted to make an application to the Court for a deficiency judgment against Defendants.

B. The Parties’ History

The Verified Complaint (“Complaint”) (Ex. 1 to P’s motion), filed on December 11, 2009, alleges as follows:

Country brings this action to foreclose all rights, claims, liens and equity of redemption, other than its own security interests, in the premises known as 225 Merrick Road, Lynbrook, New York and 213-213A Denton Avenue, Lynbrook, Nassau County, New York (“Mortgage Premises”), a one-story commercial building with a parking lot with fifteen (15) parking spaces, due to the default of Merrick-Lynbrook LLC (“Merrick LLC”) under a Mortgage and Security Agreement (“Mortgage”), and a Mortgage Note (“Note”) between Merrick and Country (collectively “Loan Documents”).

Country, a banking corporation, is 1) the current Holder of the Note, 2) the current Mortgagee under the Agreement, and 3) the current Lender under the applicable Guaranty of Payment (“Guaranty”). Merrick LLC, a New York limited liability company, is the Mortgagor under the Agreement and the Maker under the Note. Defendant Jonathan Green (“Green”) is a member of Merrick LLC and a Guarantor of the Mortgage between Merrick LLC and Country; and Defendant Sheskel Wieder (“Wieder”) is a Guarantor of the Mortgage.

On or about November 27, 2007, Country loaned Merrick LLC the sum of Nine Hundred Thousand and 00/100 dollars (“900,000.00”) (“Principal Sum”), for the purpose of purchasing and renovating the Premises, to be evidenced by a Note and secured by a Mortgage on the Premises. On or about November 27, 2007, Merrick LLC executed and delivered to Plaintiff the Note (Ex. A to P’s motion), pursuant to which Merrick LLC acknowledged its indebtedness for the Principal Sum, together with interest at the rate of eight percent (8%) *per annum*. The Note also provides for a default interest rate of twenty-four percent (24%) *per annum* or the maximum legal rate of interest, whichever is lower.

The Note also provides for payments of interest only from January 2008 up to and

including June 2009 (“Interest Only Period”) on the first date of every month and, thereafter, for a fixed monthly payment of principal and interest in the amount of Six Thousand Nine Hundred Forty-Six and 35/100 dollars (\$6,946.35) (“Monthly Debt Service Payment Amount”) to begin on July 1, 2009 and continuing to be due on the first day of each succeeding month up to and including December 1, 2010 (“Maturity Date”) with the balance of the Principal Sum, together with accrued and unpaid interest, becoming due and payable on the Maturity Date. The Interest Only and/or Monthly Debt Service Payment Amount payment is deemed late if it is not paid by the 16<sup>th</sup> of every month.

On or about November 27, 2007, as collateral security for the payment of the Note, Merrick LLC executed, acknowledged and delivered the Mortgage (Ex. B to P’s motion) to Country. The Mortgage was recorded in the Office of the Clerk of Nassau County on December 4, 2007 at Liber 32569, Page 771 and the Mortgage tax was paid. Via correspondence to the Court and opposing counsel dated April 28, 2010, Plaintiff provided the Court with a copy of the Endorsement Cover Page reflecting that recording.

To further secure Merrick LLC’s debt obligations to Country, on or about November 27, 2007, Green and Wieder executed, acknowledged and delivered to Plaintiff the Guaranty (Ex. C to P’s motion), pursuant to which Green and Wieder unconditionally guaranteed, *inter alia*, the timely payment of the Principal Sum, any interest due on the Note and all other sums due and owing under the Note, Mortgage and other related security documents. In addition, on or about November 27, 2007, Merrick LLC executed, acknowledged and delivered to Country an Absolute Assignment of Lease and Rents (Ex. D to P’s motion) and a Deferred Maintenance and Security Agreement (Ex. E to P’s motion) (collectively “Other Security Documents”).

On July 1, 2009, the Monthly Debt Service Payment Amount in the amount of \$6,946.35 became due and owing. Merrick LLC failed to pay that sum on that date, or within fifteen days thereafter, thereby defaulting on the Note and Mortgage. Thereafter, Merrick LLC failed to pay the Monthly Debt Service Payment Amount for the following months up to and including December of 2009. Country has elected to declare immediately due and payable the entire unpaid balance of principal.

By letter dated November 10, 2009 (Ex. F to P's motion), counsel for Country notified Merrick LLC, Green and Wieder, *inter alia*, that 1) Borrower was in default of its obligations under the Note because the Monthly Debt Service Payment Amount due on the July 1, 2009 Payment Date and on each subsequent Payment Date had not been made; 2) pursuant to the Note, Lender declared the unpaid principal, interest, default interest, late charges and other amounts to be immediately due and payable; 3) the principal sum of \$900,000 was currently due on the Note; 4) interest on the principal amount outstanding under the Note at the Default Rate of 24% from July 16, 2009 would continue to accrue until the Note was paid in full; 5) as a result of the Borrower's default under the Note, the Guarantors were obligated to pay to the Lender all amounts due the Lender from the Borrower under the Note; and 6) Country demanded payment by November 20, 2009 of all sums due. As of November 20, 2009, Merrick LLC had not pay the sums due by reason of its default.

In the Complaint, Country alleges that it has elected to foreclose on the collateral security, and requests that this action proceed to Judgment of Foreclosure and Sale, and that the Mortgaged Premises be sold subject to certain restrictions. Specifically, Country requests that: 1) Defendants and others whose interest was recorded subsequent to the filing of a Notice of Pendency in this action be foreclosed of a claim to the Mortgage Premises; 2) the Premises be sold; 3) the amount due to Country on its Mortgage be adjudged; 4) the moneys arising from the sale be brought into court; 5) Country be paid the sums due to it under the Note and Mortgage, as well as other sums due including taxes, and water and sewer charges, with interest; and 6) if the proceeds of the sale are insufficient to pay the sums due to Country Bank, the Referee making the sale shall specify the amount of that deficiency in his Report of Sale so that Country may make application to the Court for a judgment against Defendants for that deficiency.

Defendants Merrick LLC, Green and Weider served a Verified Answer ("Answer") dated January 12, 2010 in which they denied the allegations in the Complaint and demanded judgment dismissing the Complaint.

Plaintiff provides an Affidavit in Support of Herbert Ochoa ("Ochoa"), a Loan Workout Officer at Country, who affirms the truth of the allegations in the Complaint. In that Affidavit, dated February 11, 2010, Ochoa affirms that Merrick LLC still has not made any payments on its

debt to Country, and remains in default.

### C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to judgment by establishing 1) Merrick LLC's receipt from Country of the principal sum recited in the Note and Mortgage, 2) Defendants' execution of the relevant loan documents, and 3) Merrick LLC's default on its obligation to repay Country.

Plaintiff also seeks to amend the caption because, since the commencement of the action, Plaintiff has determined that Defendants John Doe One through John Doe Twenty-Five are not necessary parties to this action.

Defendants have submitted no opposition or other response to this motion.

## RULING OF THE COURT

### A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

### B. Foreclosure

In moving for summary judgment in 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. *Wells Fargo v. Webster*, 61 A.D.3d 856, 856 (2d Dept. 2009), citing *Republic Natl. Bank of N.Y. v. O'Kane*, 308 A.D.2d 482, 482 (2d Dept. 2003), quoting *Village Bank v. Wild Oaks Holding*, 196 A.D.2d 812, 812 (2d Dept. 1993). In *Wells Fargo, supra*, the Second Department held that plaintiff bank sustained its initial burden of demonstrating its entitlement to judgment as a matter of law by submitting proof of the existence of the note, mortgage, and consolidation agreement, and the defendants' default in payment. *Id.*

Accordingly, it was incumbent on the defendants to demonstrate, by admissible evidence, the existence of a triable issue of fact as to a *bona fide* defense. *Id.* In light of their failure to do so, the Second Department held that the trial court properly granted summary judgment to the plaintiff. *Id.*

C. Amendment of Caption and Appointment of Referee

Real Property Actions and Proceedings Law (“RPAPL”) § 1361(2) provides that the Supreme Court, by reference or otherwise, shall ascertain the amount due to any claimants and the priority of any liens for purposes of the distribution of surplus money. *American Holdings Invest Corp. v. Josey*, 2010 N.Y. App. Div. LEXIS 2457 (2d Dept. 2010). A referee may inquire into and determine all questions of law and fact, and every question tending to show the equities of the claimant, to decide to whom surplus money belongs. *Id.*, quoting *Wilcox v. Drought*, 36 Misc. 351, 352-353 (Sup. Ct. N.Y. County, 1901), *aff’d*, 71 App. Div. 402 (1<sup>st</sup> Dept. 1902).

In *NYCTL 1998-2 Trustee v. 2388 Nostrand Corp.*, 69 A.D.3d 594 (2d Dept. 2010), which involved an action to foreclose a tax lien, the Appellate Division reversed the order of the trial court that denied plaintiffs’ motion, *inter alia*, 1) for summary judgment on the complaint, 2) to strike the answer of defendant, 3) to amend the caption to strike John Does as party defendants, and 4) to appoint a referee to compute the total sums due and owing to the plaintiffs. *Id.* at 595. In so doing, the Second Department concluded that plaintiffs had made a *prima facie* showing of entitlement to judgment as a matter of law by demonstrating that the respondent did not pay the outstanding balance due under the lien, and defendant failed to raise a triable issue of fact rebutting the plaintiffs’ showing. *Id.* Accordingly, the Second Department reversed the order of the trial court and granted plaintiffs’ motion, *inter alia*, for summary judgment on the complaint, to strike the answer, to strike John Does as party defendants, and to appoint a referee to compute the total sums due and owing to the plaintiffs. *Id.*

#### D. Deficiency Judgment

RPAPL § 1371, titled “ Deficiency judgment,” provides, in pertinent part, as follows:

1. If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds, pursuant to the directions contained in such judgment, the amount thereof to be determined by the court as herein provided.
2. Simultaneously with the making of a motion for an order confirming the sale, provided such motion is made within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher.

#### E. Application of these Principles to the Instant Action

The Court concludes that Plaintiff has demonstrated its entitlement to summary judgment on the Complaint by producing the Mortgage and Note and demonstrating Defendants' default with respect to their obligations to pay pursuant to those instruments, and the applicable Guaranty. The Court also determines that Defendants have failed to raise a triable issue of fact to rebut that showing. Accordingly, the Court grants Plaintiff's motion for summary judgment.

In light of the Court's conclusion that Plaintiff has demonstrated its right to summary judgment, the Court grants Plaintiff's motion to amend the caption by striking “John Doe One through John Doe Twenty-Five” from the caption, and directs that the caption shall appear in the form proposed by Plaintiff in its motion.

The Court, further, grants Plaintiff's application for the appointment of a Referee to compute the sum due Plaintiff, and will select the Referee to complete that computation.

Finally, the Court grants Plaintiff's request for permission to make application to the Court, pursuant to RPAPL § 1371, for a judgment against Defendants for any deficiency following the sale of the Mortgage Premises.


The Court directs Plaintiff to submit judgment on notice, as well as proposed orders, on notice, with respect to the amendment of the caption and appointment of a Referee.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY  
April 29, 2010



HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**  
MAY 05 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE