

**Emigrant Mtge Co., Inc. v Daniels**

2010 NY Slip Op 32720(U)

October 1, 2010

Supreme Court, New York County

Docket Number: 105057/2008

Judge: Paul G. Feinman

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN

PART 12

Index Number : 105057/2008

EMIGRANT MORTGAGE

vs

DANIELS, EUGENE R., III

Sequence Number : 003

JUDGMENT OF FORECLOSURE & SALE

INDEX NO. 105057/08

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

112

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
OCT 04 2010  
COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ANNEXED DECISION AND ORDER.**

Dated: October 1, 2010

Paul A. Feinman  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X  
EMIGRANT MORTGAGE COMPANY, INC.,

Plaintiff,

Index Number 105057/2008

Mot. Seq. No. 003

against

EUGENE R. DANIELS III, CHARLENE G. DANIELS,  
NEW YORK CITY PARKING VIOLATIONS  
BUREAU, CHERYL COPELAND, CHARLENE  
JACKSON, RSZ INC., CHERYL LYN GLOVER a/k/a  
CHERYL JONES, NEW YORK STATE COMMISSION  
OF TAXATION AND FINANCE, NEW YORK CITY  
DEPARTMENT OF TAXATION AND FINANCE,  
and HORACE COPELAND,

Defendants.

DECISION AND ORDER

**FILED**  
OCT 04 2010  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X

**For the Plaintiff:**

Belkin Burden Wenig & Goldman, LLP  
By: William M. Rifkin, Esq.  
270 Madison Avenue  
New York NY 10016

**For the Daniels Defendants:**

Eugene R. Daniels III and Charlene G. Daniels, *pro se*  
408 West 145<sup>th</sup> Street  
New York NY 10031

Papers considered in review of this motion for judgment of foreclosure and sale:

<b>Papers</b>	<b>Document Number</b>
Notice of Motion and Affidavits Annexed	1
Combined Oath of Referee & Report of Computation	2

**PAUL G. FEINMAN, J.:**

Plaintiff seeks an order confirming the March 8, 2010 report by Referee Regina L. Darby, Esq., as to the amount due to plaintiff, and for a judgment of foreclosure and sale of the mortgaged premises at issue, as well as an award of attorneys' fees and expenses. The motion is unopposed. For the reasons which follow, the motion is denied without prejudice to renewal.

Plaintiff commenced a foreclosure action against defendants Eugene R. Daniels III and Charlene G. Daniels on April 8, 2008 (Mot. Ex. A). The action pertains to an adjustable rate

loan note and mortgage signed on April 20, 2007, in which the Daniels agreed to pay plaintiff a total principal sum of \$ 845,653.51. The mortgaged premises are known as 408 West 145<sup>th</sup> Street, New York, New York 10031, bearing tax map designation of Block 2050, Lot 50 (Referee's Oath & Report Ex. B). The property is recorded by the Office of the City Register of the NYC Department of Finance as consisting of a "4-6 family with store/office." (*Id.*).

Each of the defendants was served with process thereafter (Mot. Ex. C [affidavits of service]). The Daniels answered the summons and complaint by their attorney on about June 30, 2008 (Mot. Ex. D). None of the other individual or governmental defendants have apparently answered or otherwise appeared.

Plaintiff thereafter moved for summary judgment, with decision held in abeyance pending settlement negotiations pursuant to the court's order. Negotiations proving unfruitful, the court by decision and order dated January 13, 2010, granted the motion for summary judgment, and ordered the appointment of Regina L. Darby, Esq., as referee to ascertain and compute the amounts owed upon the note and mortgage being foreclosed in this action and determine whether the property can be sold in one parcel.

Referee Darby has submitted her Combined Oath of Referee and Referee's Report of Computation dated March 8, 2010. Included in her Report are copies executed by the Daniels and given to plaintiff of the adjustable rate note dated April 20, 2007, and the mortgage as recorded by the New York City Department of Finance, Office of the City Register under CFRN 2007000248323 (Referee Oath & Report Ex. B), as well as the Computation Affidavit prepared by plaintiff's Assistant Treasurer, Joel Marcano, dated February 18, 2010 (Referee Oath & Report Ex. C). Marcano's affidavit states that since commencement of the action, no payments

have been made to the principal sum or of interest, and as of February 15, 2010, there was due and owing \$845,653.51 in principal, and \$328,502.48 in interest, and that interest accrues at 18% annually. Marcano also indicates that the Daniels have in addition incurred escrow debit for real estate taxes (\$6,140.20), fire insurance (\$8,512.00), late charged (\$509.88), appraisals (\$350.00), and inspections (\$425.00), and that as of February 15, 2010, there was due and owing to plaintiff the total amount of \$1,190,093.07, in addition to attorney's fees and expenses (Ref. Oath & Report Ex. C, Marcano Aff. ¶¶ 5-8; Ex. D [itemized computation schedule]). This is the amount determined by Referee Darby to be due and owing as of February 15, 2010 (Ref. Oath & Report ¶¶ 3-4). The referee recommends that the mortgaged premises be sold as one parcel (*Id.* ¶ 4).

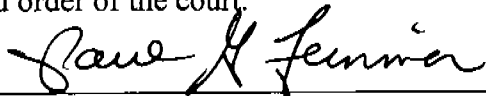
Although the referee's report seems to be in order, plaintiff's motion cannot be granted. There is insufficient proof of the non-military status of the defaulting individual defendants, who are necessary parties in this proceeding (RPAPL § 1311 [1]). The federal Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. § 520, as applied by the New York courts (*Palisades Acquisition, LLC v Ibrahim*, 12 Misc 3d 340 [Civ Ct, New York County 2006]), requires that, prior to entering a judgment where a defendant has defaulted, the plaintiff must submit a "non-military" affidavit establishing: 1) the defendant is not in the military service of either the United States or any ally; 2) the investigation was done *after* the default occurred; 3) the investigation was performed shortly before it was submitted to the court; and 4) "the facts are put forth in a manner sufficient for the court's evaluation." (*New York City Hous. Auth. v Smithson*, 119 Misc 2d 721, 723 [Civ Ct, New York County 1983]). Here, although the two mortgagors of the premises interposed an answer, none of the *other* individual defendants, presumably tenants in the building, answered, appeared, or waived appearance, and it is unclear whether, in this time

of war, their defaults were due to their military status.<sup>1</sup> Therefore, the motion must be denied without prejudice. It is

ORDERED that the motion is denied without prejudice to renew.

This constitutes the decision and order of the court.

Dated: October 1, 2010  
New York, New York

  
\_\_\_\_\_  
J.S.C.

**FILED**  
OCT 04 2010  
COUNTY CLERK'S OFFICE  
NEW YORK

---

<sup>1</sup>It is also not clear whether any of the municipal or State defendants should in fact be given notice of the judgment of foreclosure, when it is issued.