

**Eastern Capital Group, LLC, v 2480 Richmond  
Terrace Real Estate Corp.**

2011 NY Slip Op 33346(U)

August 4, 2011

Supreme Court, Richmond County

Docket Number: 130213/2010

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

**EASTERN CAPITAL GROUP, LLC,**

*Plaintiff,*

*-against-*

**Index No: 130213/2010  
Calendar Nos: 349-005  
874-006**

**2480 RICHMOND TERRACE REAL ESTATE CORP.,  
ARTHUR SANTOPIETRO, ARTHUR SANTOPIETRO, JR.,  
NEW YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE, HANDYMAN METALS & TRANSFER,  
CYCLE PRO, MENA STATEN ISLAND AUTO REPAIR  
INC., MADGDY BUSTAROUS, ELGALAL ABOULLA,  
C-ANNE CORP. DBA AAA APPLE CAR SERVICE, J&W  
AUTO REPAIR, LEONARDO’S WHOLESALE AUTO  
REPAIRS CORP., ANTHONY CALICHIO DBA GENERAL  
AUTOGLASS and “JOHN DOE #1 through JOHN DOE #12”,  
the last twelve names being fictitious and unknown to Plaintiff,  
the persons or parties intended being the tenants, occupants,  
persons, or corporations, if any having or claiming an interest  
upon the premises described in the Complaint,**

**DECISION  
HON. JOSEPH J. MALTESE**

*Defendants.*

The following papers numbered 1 to 5 were marked fully submitted on the 6<sup>th</sup> day of May, 2011:

	Pages Numbered
Notice of Motion for Summary Judgment by Plaintiff Eastern Capital Group, LLC, with Supporting Papers (dated January 31, 2011).....	1
Notice of Cross Motion to Amend Answer by Defendants 2480 Richmond Terrace Real Estate Corp., Arthur Santopietro and Arthur Santopietro, Jr., with Supporting Papers (dated April 7, 2011).....	2
Reply Affirmation by Plaintiff (dated April 27, 2011).....	3
Affirmation in Reply by Defendants (dated April 29, 2011).....	4
Reply Affirmation (dated May 4, 2011).....	5

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Upon the foregoing papers, plaintiff's motion (No. 349) for, *inter alia*, summary judgment, striking the verified answer of defendants 2480 Richmond Terrace Real Estate Corp., Arthur Santopietro and Arthur Santopietro, Jr., and appointing a referee to compute is granted, in accordance herewith, and defendants' cross motion (No. 874) for leave to amend their answer is denied.

Plaintiff Eastern Capital Group, LLC (hereinafter "Eastern Capital") commenced this action to foreclosure a certain "Mortgage Consolidation, Modification and Extension Agreement" dated May 7, 2007 given to plaintiff to secure payment of a "Consolidated, Restated and Extended Mortgage Note" dated May 7, 2007 in the amount of \$1,300,000.00. To the extent relevant, the defendant-mortgagor 2480 Richmond Terrace Real Estate Corp. (hereinafter "2480 Richmond Terrace") and the defendant-guarantors Arthur Santopietro and Arthur Santopietro, Jr., (hereinafter, the "Santopietro defendants") subsequently interposed an answer wherein they asserted general denials and certain affirmative defenses, i.e., (1) failure to state a cause of action, (2) lack of personal jurisdiction,<sup>1</sup> and (3) waiver.

It is well settled that on a motion for summary judgment in foreclosure, a plaintiff establishes its right to judgment as a matter of law through the production of the relevant mortgage, the unpaid note and evidence of the default (*see Chiarelli v Kotsifos*, 5 AD3d 345, 345-346). Consonant with this principal, the plaintiff at bar has established its prima facie case by tendering copies of the subject mortgage and note along with the personal guarantees of the Santopietro defendants, and evidence of the default in the form of an affidavit from plaintiff's managing member, Eli Hamway (*id.*; *see JP Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662, 663; *Charter One Bank v Houston*, 300 AD2d 429, 430, *lv dismissed* 99 NY2d 651). With this established, the burden shifted to defendants to lay bare their proof and demonstrate, by admissible evidence, the existence of a material issue of fact requiring a trial (*see Aames Funding Corp. v Houston*, 44 AD3d 692, 693, *lv denied* 10 NY3d 704; *Charter One Bank v Houston*, 300 AD2d at 430).

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<sup>1</sup> This defense is deemed waived since defendants failed to move to dismiss the complaint based on the alleged improper service within 60 days of serving their answer (*see* CPLR 3211[e]).

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In opposing summary judgment and cross-moving for leave to amend their verified answer, defendants 2480 Richmond Terrace and the Santopietros maintain that plaintiff is not the owner and holder of the subject mortgage and note, as evidenced by a recorded collateral assignment of the subject mortgage dated May 7, 2007 to nonparty Israel Discount Bank of New York<sup>2</sup> (hereinafter “Israel Bank”), and therefore lacks standing to bring this foreclosure action. In this regard, defendants argue that legal title of the subject mortgage and note is vested in Israel Bank which, undisputedly, has not re-assigned said mortgage and note to plaintiff. In the alternative, defendants contend that Israel Bank, as the assignee of the subject mortgage and note, is a necessary party whose absence compels dismissal of the action.

In further opposition, it is alleged that defendant-mortgagor relied upon the verbal assurances given by its lender’s representatives that it would be afforded additional time in order to obtain alternative financing, and that this “oral waiver” was not withdrawn on proper notice prior to the commencement of this foreclosure action. According to the cross movants, their efforts to obtain such refinancing has been undermined by the premature institution of these proceedings. These conclusory assertions by defendant’s counsel, however, are not based upon personal knowledge, wholly unsupported by the evidence and legally insufficient to raise a material issue of fact to defeat summary judgment (*see also Zuckerman v City of New York*, 49 NY2d 557). Moreover, any such waiver defense is belied by a certain forbearance letter dated August 18, 2008, wherein plaintiff only agreed to extend the maturity date of the subject note from May 6, 2008 to November 30, 2008. This action was not commenced until January 29, 2010. Pertinently, said “letter agreement” specifically provides that the lender (1) does not waive its remedies and (2) in the event of a default, may, *without further notice*, immediately institute actions or exercise any other available remedies. Finally, defendants reliance on Nassau Trust Co. v Montrose Concrete Prods. Corp. (56 NY2d 175) in support of the claim that their assertion of an oral waiver gives rise to a triable issue of fact, is inapposite. In Nassau Trust, it was the unrefuted allegations in the affidavit of a party to the conversations giving rise to the purported waiver that the Court of Appeals focused upon in denying summary judgment to the

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<sup>2</sup> Apparently, plaintiff assigned the subject mortgage and note to Israel Bank as security for certain loans given by the latter to the former.

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plaintiff-mortgagee (*id.* at 182-183). Here, however, there is no affidavit by anyone with personal knowledge claiming an oral modification or waiver of plaintiff's rights under the August 18, 2008 forbearance letter.

Turning to defendants' proposed amendment to their verified answer to plead Eastern Capital's alleged lack of standing, it is the Court's opinion that this defense is totally devoid of merit (*see* Long Is. Tit. Agency, Inc. v Frisa, 45 AD3d 649). In this regard, although both plaintiff and defendants substantially agree that plaintiff's collateral assignment of the subject mortgage and note resulted in a "pledge, not a sale", and that both the assignee (Israel Bank) and assignor (Eastern Capital) shared a common ownership interest, it is defendants' contention that the latter was required to join the former as a coplaintiff in any foreclosure action. However, the authority cited in support thereof, Bank of Tokyo Trust Co. v Urban Food Malls (229 AD2d 14, 23,) does not go that far, holding only that the *pledgee* of a mortgage assigned as collateral to secure a debt is entitled to bring a foreclosure action in its own right provided that the pledgor is also joined as a party (*id.* at 23 [internal quotation marks and citations omitted]). As for defendants' reliance on Tokyo Trust to support their claim that plaintiff's pledge of the subject mortgage operated to deprive it of standing to maintain this action, it is worthy of note that the court in that case was never called upon to answer the question of whether this "complete[d] assignment of the mortgage [through] which the pledgee [acquires] a superior interest" (*id.* at 23), bars the pledgor from commencing a foreclosure action. Notably, one of the principle cases relied upon in Tokyo Trust takes the opposite position, holding (albeit partially in dicta) that both the pledgee and pledgor can maintain a foreclosure action provided that the other is joined as a coplaintiff or defendant (*see* Matter of Renaissance Residential Dev. Assocs., 146 Bankr 68, 71 [EDNY 1992], citing Simon v Satterlee, 64 NY 657). Also pertinent on this issue is the Court of Appeals' observation in Gilbert v Thayer (104 NY 200, 211) that "the assignment [of a mortgage as collateral] is in substance a ... pledge of the transferred security...[and] gives to the assignee merely a defeasible title, which ends upon payment of the debt, leaving ownership in the assignor precisely as if no transfer had been made" (*see also* Dalton v Smith, 86 NY 176).

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In any event, it is well settled that the absence of a necessary party in a mortgage foreclosure action is not a ground for dismissal, but simply leaves such party's rights unaffected by the judgment of foreclosure and sale. Hence, the foreclosure sale is said to be void as to the omitted party (1426 46 St., LLC v Klein, 60 AD3d 740, 742; Glass v Estate of Gold, 48 AD3d 746, 747; 6820 Ridge Realty v Goldman, 263 AD2d 22, 26; Polish Natl. Alliance of Brooklyn v White Eagle Hall Co., 98 AD2d 400, 406). In view of the foregoing, defendants' proposed amendment must be seen to be palpably insufficient as a matter of law (*see* Long Is. Tit. Agency, Inc. v Frisa, 45 AD3d at 649).

Since the general denials and affirmative defenses raised unsuccessfully by the cross-moving defendants are legally insufficient to rebut plaintiff's prima facie case and demonstrate the presence of a triable issue of fact (*see* Charter One Bank v Houston, 300 AD2d at 430), its motion, *inter alia*, for summary judgment is granted.

Defendants' cross motion for leave to serve an amended answer is denied.

ENTER,

Dated: August 4, 2011

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Joseph J. Maltese  
Justice of the Supreme Court