

**Ing Bank, F.S.B. v Diluggio**

2011 NY Slip Op 33560(U)

December 28, 2011

Supreme Court, Suffolk County

Docket Number: 23750-10

Judge: Daniel Martin

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**COPY**

**SUPREME COURT OF THE STATE OF NEW YORK  
I.A.S PART 9 SUFFOLK COUNTY**

INDEX NO.: 23750-10

**PRESENT:  
HON. DANIEL MARTIN**

Motion Date: 9-09-2011  
Mot. Seq. No.: 001-MG

\_\_\_\_\_  
ING BANK, F.S.B. x

Plaintiff,

-against-

**PLAINTIFF'S ATTY:**

**FEIN, SUCH & CRANE, LLP  
747 Chestnut Ridge Road, Suite 200  
Chestnut Ridge, N. Y. 19077-6216**

**KATHY MARIE DILUGGIO, AS  
ADMINISTRATRIX OF THE ESTATE OF  
RICHARD MAHONEY A/K/A RICHARD A.  
MAHONEY; BOARD OF DIRECTORS OF  
BIRCHWOOD AT SPRING LAKE HOMEOWNERS  
ASSOCIATION, INC.; BARBARA EISENHARDT;  
NEW YORK STATE DEPARTMENT OF  
TAXATION AND FINANCE; UNITED STATES  
OF AMERICA O/B/O INTERNAL REVENUE  
SERVICE; "JOHN DOE #1-5" AND "JANE DOE  
#1-5" said names being fictitious, it being the  
intention of Plaintiff to designate any and all  
occupants, tenants, persons or corporations,  
if any, having or claiming an interest in or lien  
upon the premises being foreclosed herein**

**DEFENDANT'S ATTY:**

**TAYLOR ELDRIDGE, P.C.  
For Defendant BIRCHWOOD  
AT THE SPRING LAKE HOME  
OWNERS ASSOCIATION, INC.  
811 W. Jericho Turnpike  
Suite 210W  
Smithtown, N. Y. 11787**

Defendants.

\_\_\_\_\_ x

The following named papers have been read on this motion:  
Order to Show Cause/Notice of Motion X  
Cross-Motion  
Answering Affidavits  
Replying Affidavits

The unopposed motion (001) by the plaintiff for, inter alia, an order pursuant to CPLR 3212 awarding partial summary judgment in its favor against the defendant and the plaintiff on the counterclaim, Birchwood At Spring Lake Homeowners Association, Inc., and striking its answer; amending the caption; appointing a referee to compute amounts due pursuant to RPAPL § 1321; and for counsel fees, costs and disbursements, is granted.

The plaintiff, ING Bank, FSB, commenced this action to foreclose a mortgage it holds on certain real property known as 26 Julia Circle, Middle Island, New York 11953, formerly owned by Richard Mahoney also known as Richard A. Mahoney (“the decedent”). The decedent died intestate on May 10, 2009 leaving as his two heirs at law Kathy Marie DiLuggo, sued herein as Kathy Marie DiLuggio (“DiLuggio”) as Administratrix of the decedent’s estate, and her sister, the defendant Barbara Eisenhardt (“Eisenhardt”). On September 16, 2009, Letters of Administration with respect to the decedent’s estate were issued to DiLuggio by the Surrogate’s Court, Suffolk County under File No: 331A2009/A.

Issue was joined by the defendant and the plaintiff on the counterclaim, Birchwood At The Spring Lake Home Owners Association, Inc. (“Birchwood”). In its answer, Birchwood denies some allegations in the complaint and denies knowledge or information as to other allegations. Birchwood also asserts three affirmative defenses, a “first” counterclaim/cross-claim against all parties and two additional cross-claims against defendant DiLuggio for money judgments. In its first and second affirmative defenses, Birchwood alleges that its filed lien for unpaid assessments is entitled to priority in this action and that it is entitled to all surplus monies at a surplus money hearing/sale. In its third affirmative defense, Birchwood alleges that this Court lacks personal jurisdiction over it on the basis that service of process was improper. In its “first” counterclaim and cross-claim against all parties, Birchwood, as a defendant-plaintiff, demands, in part, a declaratory judgment adding all outstanding sums which continue to accrue for assessments, common charges and related fees to its filed lien; permitting Birchwood to enforce said liens and/or seek a determination of priority thereof in any independent action or proceeding, including a surplus money proceeding; and granting Birchwood a foreclosure and sale and an order extinguishing certain subsequently filed liens. In its second cross-claim, Birchwood requests a money judgment against DiLuggio as Administratrix of the decedent’s estate for, inter alia, unpaid assessments, common charges, late charges and interest in an amount to be proven at trial. In its third cross-claim, Birchwood requests a money judgment against DiLuggio as Administratrix and as heir of the decedent’s estate for, inter alia, unpaid assessments, common charges and late charges in the amount of \$13,867.37, plus interest and attorneys fees. Parenthetically, in the third cross-claim, no claim is made by Birchwood against Eisenhardt as an heir of the decedent’s estate. In its reply, the plaintiff has denied some allegations in the counterclaim and denied knowledge or information as to other allegations therein. The plaintiff now moves for an order pursuant to CPLR 3212 striking Birchwood’s answer and affirmative defenses, for an amendment of the caption, and for the appointment of a referee to compute pursuant to RPAPL § 1321. The remaining defendants have not appeared or answered the complaint or the cross claims (*see*, CPLR 3018 [a]; 3019 [d]), and no opposition has been filed to this motion.

A plaintiff in a mortgage foreclosure action establishes a prima facie case for summary judgment by submission of the mortgage, the mortgage note, bond or obligation, and evidence of default (*see*, *Garrison Special Opportunities Fund, L.P. v Arthur Kill Hillside Dev. Co., LLC*, 82 AD3d 1042, 918 NYS2d 894 [2d Dept 2011]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]; *Washington Mut. Bank FA v O’Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). Also, a first mortgage foreclosure sale, except to the extent of surplus moneys, extinguishes all prior liens and vests full title in the grantee (*see*, RPL § 339-z; *Fleet Mortg. Corp. Nieves*, 272 AD2d 435, 707 NYS2d 671 [2d Dept 2000]; *GE Capital Mortg. Servs. v Misevicis*, 204 AD2d 963, 612 NYS2d 275 [3d Dept 1994]). The plaintiff produced the note and mortgage executed by the decedent on February 26, 2007

and recorded on April 3, 2007, as well as evidence of nonpayment by DiLuggio. Additionally, the plaintiff submitted the “Notice of Lien For Unpaid Assessments” allegedly executed and sworn to on October 29, 2009 by the President of Birchwood and purportedly stamped filed by Judith A. Pascale, Clerk of Suffolk County on November 12, 2009. Therefore, the plaintiff demonstrated its prima facie entitlement to judgment as a matter of law as to the default in payment by DiLuggio (*see, US Bank Natl. Assoc. v Eddy*, 79 AD3d 1022, 914 NYS2d 901 [2d Dept 2010]), as well as proof that the mortgage was executed and recorded prior to Birchwood’s lien (*see also*, CPLR 5203; *Dimes Savings Bank v Roberts*, 167 AD2d 674, 563 NYS2d 253 [3d Dept 1990]). The burden thus shifted to the Birchwood to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see generally, EMC v Mtge. Corp. Riverdale Assocs.*, 291 AD2d 370, 737 NYS2d 114 [2d Dept 2002]; *Paterson v Rodney*, 285 AD2d 453, 727 NYS2d 333 [2d Dept 2001]).

Birchwood failed to raise a triable issue of fact as the general denials set forth in its answer are insufficient, as a matter of law, to defeat the plaintiff’s unopposed motion (*see, Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1<sup>st</sup> Dept 1996]; *Greater N.Y. Sav. Bank v 2120 Realty Inc.*, 202 AD2d 248, 608 NYS2d 463 [1<sup>st</sup> Dept 1994]). Moreover, the affirmative defenses set forth in the answer, which are factually unsupported by an affidavit from an officer of Birchwood (*e.g., Zuckerman v City of New York*, 49 NY2d 557, 563, 427 NY2d 595 [1980]; *2 N. St. Corp. v Getty Saugerties Corp.*, 68 AD3d 1392, 1395, 892 NYS2d 217 [3d Dept 2009]; *Simpson v King*, 48 AD3d 788, 788, 915 NYS2d 591 [2d Dept 2008]), are without apparent merit (*see, Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, *Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]; *Beneficial Homeowner Serv. v Girault*, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]). More, specifically, the first affirmative defense is stricken as without merit as the subject mortgage is a recorded first mortgage and lien upon the premises, and, as such, Birchwood’s lien, is subordinate (*see, RPL § 339-z; Bankers Trust Co. v Board of Managers of Park 900 Condominium*, 81 NY2d 1033, 600 NYS2d 191 [1993]; *Dime Sav. Bank v Kakar*, 203 AD2d 50, 610 NYS2d 33 [1<sup>st</sup> Dept 1994]; *c.f., Foxwood Run Condominium v Goller Place Corp.*, 166 Misc2d 216, 624 NYS2d 758 [Sup Ct, Richmond County, Sept. 14, 1995]; *compare, Fleet Mortg. Corp. v Nieves*, 272 AD2d 435, 707 NYS2d 671 [2d Dept 2000]; *Victoria Woods Homeowners Ass’n v Gonyo*, 192 AD2d 1107, 596 NYS2d 259 [1993]). Regarding the second affirmative defense, any claim by Birchwood to priority over other named defendants herein to surplus monies, if any, is not a valid defense to this foreclosure action as the Court, via a surplus money proceeding, will determine the priority of entitlement to surplus funds, if any (*see, RPAPL §§ 1361; 1362; American Holdings Inv. Corp. v Josey*, 71 AD3d 927, 899 NYS2d 252 [2d Dept 2010]). Thus, the second affirmative defense is stricken. The third affirmative defense that the Court lacks jurisdiction over Birchwood is stricken as Birchwood does not allege by way of affidavit from an officer thereof that it was not properly served with process herein (*see, Associates First Capital Corp. v Wiggins*, 75 AD3d 614, 904 NYS2d 668 [2d Dept 2010]). Moreover, this defense was waived as Birchwood failed to move to dismiss the complaint against it on this ground within 60 days after serving its answer (*see, CPLR 3211 [e]; Reyes v Albertson*, 62 AD3d 855, 878 NYS2d 623 [2d Dept 2009]; *Dimond v Verdon*, 5 AD3d 718, 773 NYS2d 603 [2d Dept 2004]). In any event, Birchwood failed to oppose this motion and lack of opposition is tantamount to consent (*see, Hermitage Ins. Co. v Trance Nite Club, Inc.*, 40 AD3d 1032, 834 NYS 2d 870 [2d Dept 2007]; *c.f., Fappiano v City of New York* 5 AD3d 627, 774 NYS2d 773 [2d Dept 2004]; *leave to appeal den.*, 4 NYS3d 702; 790 NYS2d 648 [2004]). Additionally, “uncontradicted facts are deemed admitted” (*Tortorello v Larry M. Carlin*, 260 AD2d 201, 688 NYS2d 641 [1<sup>st</sup> Dept 1999]).

Turning to the “first” counterclaim, Birchwood’s lien, which was filed after the subject mortgage was recorded, is extinguished upon foreclosure and Birchwood is only entitled to surplus proceeds, if any, which remain once the mortgage is satisfied (*see*, RPAPL §1353; *see*, *Sautter v Frick*, 229 AD2d 345, 242 NYS2d 369, *affid.*, 256 NY 535 [1931]; *Bankers Trust Co. v Board of Managers of Park 900 Condominium*, 81 NY2d 1033, *supra*; *Washington Mut. Home Loans, Inc. v Jones*, 27 AD3d 728, 814 NYS2d 166 [2d Dept 2006]; *Dime Sav. Bank v Kakar*, 203 AD2d 50, *supra*). Therefore, since Birchwood’s counterclaim is sufficiently independent of the plaintiff’s foreclosure action and as Birchwood has not taken a position with respect to this motion, the “first” counterclaim, which is deemed a claim for surplus monies, is severed from the foreclosure action (*see*, CPLR 3212 [e][1]; 5102; *Robert Stigwood Organisation, Inc. v Devon Co.*, 44 NY2d 922, 408 NYS2d 5 [1978]; *Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer*, 67 AD3d 872, *supra*; *First Union Mortg. Corp. v Fern*, 298 AD2d 490, 749 NYS2d 42 [2d Dept 2002]). Similarly, Birchwood’s first cross-claim for, among other things, a declaratory judgment determining the priority of and extinguishing certain subsequently filed liens, as well as Birchwood’s second and third cross-claims for money judgments are also severed (*see*, CPLR 3212 [e] [1]; 5102; *First Union Mortg. Corp. v Fern*, 298 AD2d 490, *supra*).

By its moving papers, the plaintiff further established the default in answering on the part of the remaining defendants, DiLuggio, Eisenhardt, the New York State Department of Taxation and Finance and the United States of America on behalf of Internal Revenue Service, none of whom have served answers to the plaintiff’s complaint (*see*, CPLR 3215 [a], [b]). Accordingly, the defaults of these defendants are fixed and determined. Since the plaintiff has been awarded partial summary judgment against Birchwood, and has established a default in answering by the remaining defendants who have not answered, the plaintiff is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see*, RPAPL § 1321; *Neighborhood Hous. Servs. Of N.Y. City, Inc. v Meltzer*, 67 AD3d 872, *supra*; *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The referee appointed herein shall, within thirty (30) days of the sale of the subject property, file his/her report showing the disposition of the funds received on the sale and shall include, in said report, a statement indicating a computation of a surplus or deficiency pursuant to RPAPL § 1355 [1]. If applicable, the referee appointed herein shall comply with RPAPL § 1354 [3].

Those portions of the instant motion wherein the plaintiff seeks an order amending the caption by deleting “John Doe #1” through “John Doe #5” and “Jane Doe #1” through “Jane Doe #5” as a fictitious defendant is granted pursuant to CPLR 1024. By its submissions, the plaintiff established the basis for this relief. (*see*, *Neighborhood Hous. Servs. Of N.Y. City, Inc. v Meltzer*, 67 AD3d 872, *supra*). All future proceedings shall be captioned accordingly.

According to the records maintained by Court’s computerized database, a pre-screening foreclosure settlement conference was held in Patchogue on October 21, 2010. At the conference, this matter was marked that it was not eligible for an additional conference and, as a result, it was referred as an IAS case. Accordingly, there has been compliance with CPLR 3408 and no further settlement conference is required.

Proposed Order appointing referee to compute pursuant to RPAPL § 1321 signed as modified by

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the Court. The plaintiff is directed to serve a copy of this order with notice of its entry upon the Calendar Clerk of this Court.

Dated: DECEMBER 28, 2011  
Riverhead, NY

  
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HON. DANIEL MARTIN, A.J.S.C.

           FINAL DISPOSITION   X   NON-FINAL DISPOSITION