

**Bank of Smithtown v 415 W. 150 LLC**

2012 NY Slip Op 30953(U)

April 9, 2012

Supreme Court, New York County

Docket Number: 117868/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
J.S.C. Justice

PART 10

*Bank of Smithtown*  
*450 West 150 LLC*

INDEX NO. 117868/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 13  
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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.*

Dated: 4/9/12

*[Signature]*  
HON. JUDITH J. GISCHE, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

**Supreme Court of the State of New York  
County of New York: Part 10**

-----X  
BANK OF SMITHTOWN,

Plaintiff,

-against-

415 WEST 150 LLC, STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE,  
DAVID DIAMOND, MJM CONSTRUCTION  
SERVICES LLC, OUTERBRIDGE PLUMBING  
GROUP LLC, MAGNUSSON ARCHITECTURE  
& PLANNING, PC AMERITRANS CAPITAL  
CORP. and JOHN DOE 1 TO 25,

Defendants.  
-----X

**Decision/Order**  
Index No.: 117868/09  
Seq. No. : 012

**Present:**  
Hon. Judith J. Gische  
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
OSC, JDO affirm, exhibits.....	1
Notice of Corss-Motion, CMS affirm, exhibits.....	2
JDO affir. in opposition, exhibits.....	3

Upon the foregoing papers the decision and order of the court is as follows:

Defendant, 415 West 150 LLC and David Diamond (collectively "415 West")  
move to vacate their default in appearing at a hearing before Referee Miriam Breier on  
January 18, 2012. Plaintiff, the Bank of Smithtown (the "Bank"), has cross-moved to:  
[1] delete references to "John Doe 1 to 25" from the caption, [2] confirm Referee  
Breier's February 2, 2012 report; [3] fix attorneys' fees and [4] obtain a judgment of  
foreclosure. The cross-motion is opposed by 415 West.

This is an action to foreclose three mortgages which encumber the parcel of real property known by the street address as 145 West 150<sup>th</sup> Street, New York, N.Y. By decision and order dated January 3, 2011, the court granted summary judgment to the Bank on all three mortgages and Miriam Marcia Breier, Esq. was appointed the Referee to compute the amounts due. Thereafter, plaintiff moved to confirm Referee Breier's report. By decision and order dated August 26, 2011, that motion was denied, without prejudice, because 415 West had not been properly notified of the date of the hearing. The court directed that a new hearing be held, at which time 415 West could present proof and arguments in opposition to the Bank's proof of the amounts due.

Thereafter, 415 West was notified of the new date, time and location of the Referee's hearing, which was to be held on January 18, 2012, 2:00 p.m. at the office of Referee Breier. Prior to January 18, 2012, 415 West's counsel moved to be relieved on the basis that it had been notified by its client that it did not want the firm to act on their behalf any longer. By decision and order, dated January 5, 2012, the court granted the motion to be relieved, but expressly stated that the referee hearing scheduled for January 18, 2012 would not be stayed, but would proceed.

According to J. David O'Brien, Esq., 415 West's current attorney, he first met his client at 11:30 a.m. on the date that the hearing before the Special Referee was to take place. He agreed by noon to represent 415 West. He proceeded to the courthouse, where he believed the hearing was to take place at 2:00 p.m. that day, only to discover that the hearing was to take place at another location. By the time he contacted Referee Breier, the hearing had already been held. A report was rendered shortly thereafter detailing the amounts due. On February 8, 2012, this order to show cause

was presented to the court for signature.

Since that time, a motion for the appointment of a temporary receiver and to change the name of the plaintiff to Hamilton Heights Funding LLC has been granted.

In order to vacate the default, 415 West is required to show both an excusable default and a meritorious defense. See: CPLR 5015. It has done neither and the motion to vacate the default before the referee is denied.

While this court has no reason to question whether Mr. O'Brien knew where the referee's hearing was being held, his client, 415 West, either knew or should have made it their business to know the location. By January 5, 2012, it was clear from the court's orders that the referee's hearing was going forward, notwithstanding that 415 West had effectively discharged their former counsel. Its failure to hire a new attorney until only hours before the hearing, is inexcusable, as is its failure to provide its new attorney's with appropriate information about the location of the hearing.

In any event, there is simply no showing that the amount calculated by Referee Breier is incorrect. In its "reply" the only argument made that somehow these calculations are wrong is that the building is eligible for a 421-a tax abatement which will significantly reduce the taxes due. Mr. Diamond claims that he thought this application had been previously filed, but acknowledges that it was not complete as of the date this motion was submitted.<sup>1</sup> Since the reduction in taxes has not yet been "approved," under the terms of the mortgage 415 West remains responsible for the full amount of

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<sup>1</sup>The copy of the David Diamond "affidavit" filed with the court is neither actually signed nor sworn to. Even were it properly subscribed, for the reasons set forth in the decision, it does not raise any meritorious defense to the Bank's claims of payments due under the mortgages.

taxes that are currently payable.

In response to the cross-motion 415 West raises no opposition to the amendment of the caption. Nor does it raise any opposition to the claim for attorneys' fees or to the entry of a judgment. Its arguments about the computations made by Referee Breier are rejected for the reasons previously stated.

With respect to the request for attorneys' fees, counsel has referred the court to the relevant portions of the mortgage documents which provide that plaintiff's counsel fees are to be paid by the mortgagor. Plaintiff's counsel has also provided the court with the monthly statements sent to their client, detailing their work and the amounts billed. They have provided an affidavit detailing the experience of counsel working on the matter. They have calculated the amount of fees that will be necessary for them to bring this matter to its conclusion. 415 West is simply silent in opposition to these claims and submissions.

The cross-motion is, therefore, granted in its entirety.

**Conclusion**

In accordance herewith it is hereby:

ORDERED that the motion to vacate defendants 415 West 150 LLC and David Diamond's default in appearing at the hearing before Referee Miriam Marcia Breier, Esq. is denied, and it is further

ORDERED that the motion to confirm the report of Referee Miriam Marcia Breier, Esq. dated February 2, 2011, is granted and the report is hereby confirmed in all respects, and it is further

ORDERED that the caption is amended to delete any references to "John Doe 1

to 25 " from the caption of the complaint, and it is further

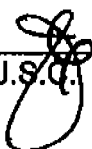
ORDERED that the court hereby awards Solomon & Tennenbaum, PC attorneys fees in the amount of \$35,642.89, and it is further

ORDERED that the plaintiff is granted a Judgment of Foreclosure and sale, and plaintiff is directed to settle a judgment, consistent with this decision, on three days notice to all appearing defendants, and it is further

ORDERED that any requested relief not otherwise granted herein is denied and this constitutes the decision and order of the court.

Dated: New York, N.Y.  
April 9, 2012

SO ORDERED:

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