

<b>Carver Fed. Sav. Bank v Goldstein &amp; Garbar</b>
2012 NY Slip Op 31423(U)
May 10, 2012
Sup Ct, Nassau County
Docket Number: 001137-11
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  
**CARVER FEDERAL SAVINGS BANK,**

**Plaintiff,**

**-against-**

**TRIAL/IAS PART: 16  
NASSAU COUNTY**

**Index No: 001137-11  
Motion Seq. No: 1  
Submission Date: 3/23/12**

**GOLDSTEIN & GARBAR a/k/a GOLDSTEIN  
& GARBAR, P.C., GARY DOLSTEIN,  
HARVEY O. GARBAR, DEPARTMENT OF TREASURY  
INTERNAL REVENUE SERVICE, NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE, and  
"JOHN DOE NO. 1" to "JANE DOE NO. 10," inclusive,  
the last ten names being fictitious and unknown to plaintiff,  
the persons or parties intended being persons, corporations or  
others, having an interest in, or lien upon, or tenants, occupants  
or persons in possession of, the mortgaged property, or any  
part thereof, described in the Complaint,,**

**Defendants.**

-----X

**Papers Read on this Motion:**

- Notice of Motion, Affirmation of Regularity, Affidavit of Merit and Exhibits.....X**
- Proposed Order of Reference and Amendment.....X**
- Affidavit in Further Support and Exhibits.....X**

This matter is before the court on the motion filed by Plaintiff Carver Federal Savings Bank ("Plaintiff" or "Carver") on November 23, 2011 and submitted on March 23, 2012. By prior Order dated February 9, 2012 ("Prior Order"), the Court reserved decision on Plaintiff's motion and permitted Plaintiff to supplement its motion papers to address the Court's concern that Plaintiff had not provided copies of the Notes and Mortgages to which the Complaint and affidavits refer, and on which Plaintiff relied in support of its motion. In the Prior Order, the

Court directed Plaintiff to file those supplementary submissions and serve them on Defendants, along with a copy of the Prior Order, via regular mail, on or before March 2, 2012. On March 6, 2012, the Court granted the application by Plaintiff's counsel to extend the March 2, 2012 deadline to March 23, 2012. Plaintiff subsequently provided the Court with its Affidavit in Further Support of Scott Emerson ("Emerson"), Vice President of Carver, which includes an Affidavit of Service reflecting the service of the supplementary submission and the Prior Order on the Defendants as directed in the Prior Order.

For the reasons set forth below, the Court denies the motion.

### BACKGROUND

#### A. Relief Sought

Plaintiff moves for an Order 1) appointing a referee to compute and report; and 2) amending the caption.

#### B. The Parties' History

The above-captioned action is for the foreclosure of a commercial mortgage. The Verified Complaint ("Complaint") (Ex. B to Wainer Aff. in Supp.) alleges that Carver is the successor by merger to Community Capital Bank ("Community") and is the owner and holder of the notes, mortgages and consolidation agreement, and related loan documents, described in the Complaint

The Complaint alleges that 1) Defendants Harvey O. Garbar ("Garbar") and Gary Goldstein ("Goldstein") are co-owners of real property located at 1800 Bellmore Avenue, Bellmore, New York ("Mortgaged Property"); and 2) Defendant Goldstein & Garbar a/k/a Goldstein & Garbar, P.C. ("G&G") is a professional corporation with a principal place of business at the Mortgaged Property. The Complaint contains two (2) causes of action which are as follows:

#### First Cause of Action

Goldstein and Garbar executed and delivered to Community a Note dated November 19, 1998 in the principal amount of \$125,000 ("Note A"). G&G executed and delivered to Community a Note dated November 19, 1998 in the principal amount of \$125,000 ("Note B"). To secure repayment of Notes A and B, Defendants G&G, Goldstein and Garbar

executed and delivered a mortgage dated November 19, 1998, granting Community a first priority mortgage lien on the Mortgaged Property ("Mortgage 1"). Thereafter, Defendants Goldstein and Garbar executed and delivered to Community a Note dated March 14, 2003 in the principal amount of \$50,000 ("Note C"). To secure payment of Note C, Defendants Goldstein and Garbar executed and delivered to Community a mortgage dated March 14, 2003 granting Community a mortgage lien on the Mortgaged Property ("Mortgage 2"). Thereafter, Mortgages 1 and 2 were consolidated pursuant to a Consolidation Agreement dated March 14, 2003 to form a single lien in the amount of \$260,665.77.

Thereafter, Defendants Goldstein and Garbar executed and delivered to Community a Note dated March 31, 2005 in the principal amount of \$210,245.61 (Note D"). To secure payment of Note D, Defendants Goldstein and Garbar executed and delivered to Community a Mortgage dated March 31, 2005. Immediately thereafter, pursuant to a Consolidation, Extension and Modification Agreement dated March 31, 2005 between Community and G&G, Goldstein and Garbar, Mortgages 1, 2 and 3 were consolidated to form a single lien in the amount of \$450,000. Thereafter, on September 26, 2008, Carver merged with Community and became the successor to Community's rights under the Notes and Consolidation Agreement.

The First Cause of Action sets forth details regarding the Defendants' default, Plaintiff's notice to the Defendants of their default, and Plaintiff's acceleration of the payment owed. Plaintiff seeks a judgment of foreclosure and other related relief, including the appointment of a receiver and a deficiency judgment.

In the Second Cause of Action, Plaintiff alleges that G&G executed a Payment Guaranty dated April 27, 2005 in which it guaranteed payment and performance of all obligations of Goldstein and Garbar with respect to the Notes and Mortgage.

Although the Complaint alleges that certain instruments are annexed as exhibits to the Complaint, those instruments were not part of the copy of the Complaint set forth at Exhibit A of Plaintiff's initial motion. In his Affidavit of Merit dated October 5, 2011, Emerson made reference to and provided copies of 1) the Consolidation, Extension and Modification Agreement made by Defendants G&G, Goldstein and Garbar, dated March 31, 2005 in the original principal amount of \$450,000 (Ex. A to Emerson Aff. of Merit), and 2) a default letter dated

October 15, 2010 from Carver to Borrowers advising them of their default and demanding immediate payment of all outstanding principal and interest due under the loan documents (*id.* at Ex. B).

In his Affidavit in Further Support dated March 14, 2012, Emerson that he has “diligently checked Carver’s files for the Negotiable (Consolidated) Promissory Note dated March 31, 2005 in the principal amount of \$450,000” (Emerson Aff. in Further Supp. at ¶ 3), which Emerson refers to as the “Consolidated Note,” but has been unable to locate it.

Emerson affirms, further, that in searching for the Consolidated Note, he reviewed other documents executed by Borrowers Garbar and Goldstein simultaneously with execution of the Consolidated Note and Consolidation Extension and Modification Agreement, which Emerson refers to as the “Consolidated Mortgage.” Emerson avers that, at the time of the execution of the Note and Consolidated Mortgage, the Borrowers were indebted to Community in connection with prior loans and advances. The Borrowers confirmed those prior obligations in a Confirmation Agreement dated March 31, 2005 (Ex. B to Emerson Aff. in Further Supp.). Emerson avers that, in the Confirmation Agreement, the Borrowers, and G&G as Guarantor, reiterated and confirmed that prior loans and advances that had been made by Community which, at that time, had an outstanding principal balance of \$239,754.39. The Confirmation Agreement also contained the acknowledgment that, with the additional loan and advance of \$210,245.61, the outstanding principal balance due Community would be in the principal sum of \$450,000.00.

Emerson avers, further, that the Borrowers also executed a “certain Negotiable (Gap) Promissory Note dated March 31, 2005 in the principal amount of \$210,245.61,” which Emerson refers to as the “Gap Note,” and a Mortgage which secured the Gap Note (Emerson Aff. in Further Supp. at ¶ 4). Emerson provides copies of the Gap Note and Mortgage (*id.* at Exs. C and D). In addition, the Confirmation Agreement further acknowledged that the entire outstanding balance due Community of \$450,000.00 would be secured by a single consolidated lien against the Premises, as reflected in the Consolidated Mortgage.

In his Lost Note Affidavit (Ex. A to Emerson Aff. in Further Supp.), Emerson affirms that Carver, as successor by merger to Community, is the record holder of a Consolidation Extension and Modification Agreement made by G&G, Garbar and Goldstein to Community Capital Bank,

dated March 31, 2005, securing the principal amount of \$450,000.00, recorded on April 6, 2005 in the Office of the County Clerk. Emerson affirms that Carver is also the lawful owner of the Negotiable (Consolidated) Promissory Note that the Consolidation Extension and Modification Agreement secures.

Emerson affirms, further, that the original Negotiable (Consolidated) Promissory Note, which was given to Community at the time of closing, is not in Carver's possession, and Emerson has made due and diligent effort to locate it, but has been unable to find it. Emerson "believes that it has been misfiled or misplaced and that the same cannot be located at this time." Emerson also avers that "no other person or corporation has any interest whatsoever in said Negotiable (Consolidated) Promissory Note other than [Carver] and that [Carver] has not assigned, sold, transferred or hypothecated the said Negotiable (Consolidated) Promissory Note or any interest therein."

#### C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to the requested relief by establishing 1) the filing and service of the Complaint, 2) Defendants' failure to appear or move in this action, 3) the filing of the Notice of Pendency, 4) the failure of Defendants Goldstein, Garbar and G&G to make timely payment under the terms of the Consolidation, Extension and Modification Agreement dated March 31, 2005, and 5) Plaintiff's notification of Defendants of their default and election to declare the entire principal sum due under the Mortgage immediately due and payable.

In response to the Prior Order, Plaintiff affirms that it is unable to locate the Negotiable (Consolidated) Promissory Note dated March 31, 2005 in the principal amount of \$450,000. Plaintiff submits, however, that there is nonetheless "no dispute" that, as of March 31, 2005, the Borrowers were indebted to Community Capital Bank, as predecessor in interest to Carver, in the principal sum of \$450,000, and that this sum was secured by a single first priority lien against the Premises pursuant to the terms of the Consolidated Mortgage. Plaintiff also argues that there is no issue with respect to the Borrowers' default, to which Emerson affirms in his Affidavit of Merit.

RULING OF THE COURT

In moving for 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).

A mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation. *FGB Realty Advisors, Inc. v. Parisi*, 265 A.D.2d 297, 298 (2d Dept. 1999). Consequently, the foreclosure of a mortgage cannot be pursued by one who has no demonstrated right to the debt. *Bank of New York v. Silverberg*, 86 A.D.3d 274, 280 (2d Dept. 2011), citing *FGB Realty, supra*, and Bergman on New York Mortgage Foreclosures § 12.05(1)(a) (1991).

The Court denies Plaintiff’s motion in light of Plaintiff’s failure to produce the March 31, 2005 Negotiable (Consolidated) Promissory Note that the Consolidation Extension and Modification Agreement secures.

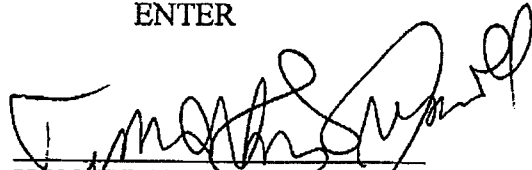
The Court directs Plaintiff to serve a copy of this Order, with Notice of Entry, on all Defendants, via regular mail, within thirty (30) days of the date of this Order.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY  
May 10, 2012

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

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**ENTERED**  
MAY 16 2012  
NASSAU COUNTY  
COUNTY CLERK’S OFFICE