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SHORT FORM ORDER

COPY

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:
HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 6/20/2012
MOTION NO.: MG

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HILLCREST BANK, N.A.,

Plaintiff,

-against-

EAST QUOGUE PARTNERS, LLC, BECKER BROTHERS, LLC and MILLENNIUM BUILDERS, INC., and John Does Nos. "1" through "5", inclusive, the names of the last 5 defendants being fictitious, the true names of said defendants being unknown to the plaintiff, it being intended to designate fee owners, tenants, or occupants of the mortgaged premises and/or persons or parties having or claiming an interest in or upon the mortgaged premises, if the aforesaid individual defendants be dead, their heirs at law, next of kin, distributees, executors, administors, trustees, comittees, devisees, legatees and the assignees, lienors, creditors and successors in interest of them, and generally all persons having or claiming under, by, through or against the said defendants named as a class, of any right, title or interest in or lien upon the premises described inthe complaint herein,

Defendants.

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Upon the following papers numbered 1 to 36 read on this application for an order granting reargument of its prior motion ; Notice of Motion/Order to Show Cause and supporting papers 1-23 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 24-36 ; Replying Affidavits and supporting papers _____; Other _____; it is

ORDERED, that this motion by plaintiff Hillcrest Bank, N.A., ("HBNA"), for an order granting reargument of its prior motion which resulted in an order of the undersigned, dated May 4, 2012, denying plaintiff's request for an order substituting Bank Midwest, N.A. as named plaintiff and denying plaintiff's application for summary judgment, without prejudice to renew upon completion of discovery proceedings, is granted as to reargument and upon reargument the plaintiff's motion is determined as follows.

In its prior motion, plaintiff sought an order substituting Bank Midwest, as a successor in interest, as plaintiff in place of HBNA; granting summary judgment to plaintiff; striking the answer of defendants East Quogue Partners, LLC, Becker Brothers, LLC and Millenium Builders, Inc. (collectively "the defendants"); and appointing a referee to compute. By order dated May 4, 2012, HBNA's motion was denied, without prejudice, to the extent that it sought an order substituting Bank Midwest, N.A. as named plaintiff, for failure to submit evidence, such as a copy of the articles of merger or assignment of the mortgage sufficient to demonstrate entitlement to relief. In all other respects, the motion was denied without prejudice to renew upon completion of discovery proceedings.

In support of the underlying motion, plaintiff submitted the note evidencing the debt, the mortgage securing it, and an affidavit from Jon J. Walker, former Senior Vice President of HBNA and a current employee of its successor in interest, Bank Midwest, N.A. Walker attested that he is responsible for servicing the commercial loan on certain real property located in the Town of Southampton, County of Suffolk, made to defendant East Quogue Partners, LLC. The loan was guaranteed by defendants Becker Brothers, LLC and Milennium Builders, Inc. Walker asserted that the defendant East Quogue Partners, LLC defaulted on the loan.

The note identifies the parties as East Quogue Partners, LLC, as "Borrower" and Hillcrest Bank as "Lender" with an office at 11111 W. 95th Street, Overland Park, Kansas 66214. The note was executed on September 22, 2005 for a loan in the amount of $15,000,000.00. Real property consisting of approximately 429 acres of vacant land in East Quogue served as collateral security for the repayment of the debt. The mortgage, like the note, identified East Quogue Partners, LLC, as the borrower, and Hillcrest Bank, a Kansas Bank, (hereinafter "Hillcrest Bank"), as the lender. The defendant allegedly defaulted on the note as of October 1, 2010 and Walker attested that the principal balance due on the note was $14,102,429.

Hillcrest Bank, went into receivership on October 22, 2010. The Federal Deposit Insurance Corporation ("the FDIC"), was named as Receiver. HBNA purchased the assets and liabilities of Hillcrest Bank including the subject mortgage and note. On May 3, 2011, the

FDIC, as receiver for Hillcrest Bank, assigned the note and mortgage to HBNA.

Thereafter, on May 24, 2011, HBNA commenced the instant action to foreclose the mortgage on the subject property. A previous action commenced by HBNA against the defendants was discontinued apparently due to the fact that the complaint in the first action incorrectly identified HBNA, rather than its predecessor, Hillcrest Bank, as the lender on the note and mortgage.

In this action, the defendants again moved to dismiss based on the defense of lack of standing, contesting the assignment from the FDIC as receiver for Hillcrest Bank to HBNA, and contending that when the action was commenced the receiver, FDIC, was the holder of the note and mortgage, not HBNA. By order of this court dated November 2, 2011, the motion to dismiss was denied on the basis that the allegations in the complaint were sufficient to support the claim that the plaintiff, HBNA, had standing to commence the foreclosure action.

In his affidavit, Walker asserts that on November 7, 2011, all the assets and liabilities of HBNA were merged into Bank Midwest, including the subject mortgage and note. Both the original moving papers and the motion to reargue included a letter dated November 22, 2011 from the Comptroller of the Currency Administrator of National Banks ["OCC"], purporting to be the official notification of the merger between HBNA and Bank Midwest, National Association, effective on November 7, 2011.

On December 21, 2011, the defendants answered the complaint alleging various affirmative defenses, but omitted lack of standing as a defense. Shortly thereafter, defendants served a First Request for Documents on HBNA as well as a notice of deposition seeking to identify the HBNA employee who had allegedly negotiated a loan modification with the defendants. Several days later, and without responding to the defendants' document request or deposition notice, HBNA moved for, *inter alia*, an order substituting Bank Midwest, N.A. for HBNA as plaintiff and for summary judgment.

In its reply memorandum of law submitted in support of summary judgment, plaintiff argued that under New York Banking Law § 602, Bank Midwest, N.A., the entity that HBNA sought to substitute as plaintiff, acquired the note and mortgage by virtue of its merger with HBNA. Plaintiff contended that under the New York State's Banking Law, no assignment of the note and mortgage was necessary.

On reargument, HBNA now asserts that the proper statute governing the rights and obligations of a national banking entity such as Bank Midwest, N.A., is 12 U.S.C.A. § 215 a (e). That statute provides at § 215 (a) that all rights, interests and choses in action of the individual merging banking association are transferred and vested in the receiving association without deed or transfer. No assignment of a mortgage is necessary for the receiving association to have vested rights in a mortgage owned by the merged banking association. HBNA concedes that the state banking law is inapplicable to federal banks like HBNA and Bank

Midwest.

In view of the foregoing, upon reargument, HBNA's motion to substitute Bank Midwest for HBNA is granted. Although generally a motion for leave to reargue must be based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, and may not be used to advance arguments different than those presented on the prior motion (CPLR 2221 [d][2]; *see* ***Pryor v Commonwealth Land Title Ins. Co.***, 17 AD3d 434, 793 NYS2d 452 [2d Dept 2005]; ***Foley v Roche***, 68 AD2d 558, 418 NYS2d 588 [1st Dept 1979]), here, the motion to substitute Bank Midwest N.A. for HBNA was specifically denied *without prejudice*. In that regard, plaintiff has provided sufficient proof to support the allegation that Bank Midwest, N.A., as the successor to HBNA, has standing to continue the action.

Turning to the plaintiff's motion for summary judgment, it is axiomatic that in moving for summary 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. ***Citibank, N.A. v Van Brunt Properties, LLC***, 95 A.D.3d 1158, 1159 (2d Dept. 2012). On the original motion, the plaintiff established its entitlement to judgment as a matter of law.

In opposition, the defendants challenged whether the plaintiff was the true owner of the loan and whether the loan had been modified or extended by HBNA or plaintiff's predecessor, Hillcrest Bank. The defendants recited that shortly after issue was joined, they sought discovery on the standing and modification issues. Rather than complying with defendants' discovery demands, HBNA moved for summary judgment. In view thereof, the undersigned denied HBNA's motion, without prejudice to renew, upon completion of discovery.

A motion to reargue is addressed to the discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or misapplied the relevant law or for some other reason improperly decided the prior motion. ***Hoey-Kennedy v. Kennedy***, 294 A.D.2d 573 (2d Dept. 2002); ***Long v. Long***, 251 A.D.2d 631 (2d Dept. 1998); Foley v. Roche, 68 A.D.2d 558 (1st Dept. 1979); CPLR 2221(d). A motion to reargue is not a means by which the unsuccessful party can obtain a second opportunity to argue issues previously decided or to present new or different arguments relating to previously decided issues. *McGill v. Goldman*, 261 A.D.2d 593 (2d Dept. 1999); ***Pahl Equipment Corp. v. Kassis***, 182 A.D.2d 22 (1st Dept. 1992).

Nevertheless, on the standing issue, irrespective of whether the controlling law was the state banking law or federal law, plaintiff HBNA has established on reargument that upon the merger of HBNA with Bank Midwest, Bank Midwest succeeded to the rights to the subject note and mortgage without the necessity of an assignment. The defendant failed to create an issue of fact with proof in admissible form that when the action was commenced the receiver, FDIC,

was the holder of the note and mortgage, not HBNA.

Regarding plaintiff's entitlement to summary judgment, the defendants have not submitted any evidence to controvert plaintiff's prima facie showing or raise an issue of fact. To the extent that it is contended in an attorney's memorandum in opposition to the motion to reargue that summary judgment should be denied because there are outstanding discovery demands regarding negotiations of an extension or modification of the loan underlying the plaintiff's action, such contention is unavailing. "A determination of summary judgement can not be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." ***Wyllie v. District Attorney of Kings***, 2 A.D.3d 714 (2d Dept. 2003). The mere hope based on speculation and surmise that discovery will reveal the existence of triable issues of fact is insufficient to forestall the grant of summary judgment in HBNA's favor. *Id.*

Accordingly the motion by plaintiff for an order granting reargument of its prior motion which resulted in an order of the undersigned, dated May 4, 2012, denying plaintiff's request for an order substituting Bank Midwest, N.A. as named plaintiff, and denying plaintiff's application for summary judgment, without prejudice to renew upon completion of discovery proceedings, is granted as to reargument. Upon reargument, the plaintiff's motion for an order substituting Bank Midwest, N.A. as named plaintiff, for summary judgment, and for the appointment of a Referee to compute the sums due and owing the plaintiff is granted.

Submit an Order of Reference.

DATED: 11 Oct. 2012

HON. JOHN J.J. JONES, JR.
J.S.C.

CHECK ONE: [ ] FINAL DISPOSITION **[X] NON-FINAL DISPOSITION**