STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE BANK OF BENNINGTON,

Plaintiff,

-against-

**DECISION and ORDER**
**INDEX NO. 2073-12**
**RJI NO. 01-12-107792**

SETRON PROSTHETICS AND ORTHOTICS CORP.; MELINDA SETZER; ERIC SETZER; REPUBLIC FRANKLIN INSURANCE COMPANY; ROBACK FERRARO + PEHL; NYS WORKERS COMPENSATION BOARD; STATE OF NEW YORK; "JOHN DOE #1-#50" and "MARY ROE #1-#50", the last two names being fictitious, said parties intended being tenants or occupants, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

Supreme Court Albany County All Purpose Term, September 28, 2012
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Schiller & Knapp, LLP
Denise M. Resta-Tobin, Esq.
*Attorneys for Plaintiff*
950 New Loudon Road, Suite #109
Latham, New York 12110

Tully Rinckey PLLC
Douglas J. Rose, Esq.
*Attorneys for Defendants Sentron Prosthetics and Orthotics Corp., Melinda Setzer and Eric Setzer*
441 New Karner Road
Albany, New York 12205

**TERESI, J.:**

Plaintiff commenced this action to foreclose the mortgage it holds on real property[1] owned by Setron Prosthetics and Orthotics Corp.[2] Defendants answered and Plaintiff now moves for summary judgement, for the appointment of a referee to compute and to amend the caption of the action. Defendants oppose the motion. Because Plaintiff failed to demonstrate its entitlement to the relief it seeks, its motion is denied.

"Entitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact." (Zanfini v Chandler, 79 AD3d 1031, 1031-32 [2d Dept 2010], quoting HSBC Bank USA v Merrill, 37 AD3d 899 [3d Dept 2007][emphasis added]; Cititbank, N.A. v Van Brunt Properties, LLC, 95 AD3d 1158 [2d Dept 2012]; La Salle Bank Nat. Ass'n v Kosarovich, 31 AD3d 904 [3d Dept 2006]).

On this record, because Plaintiff did not submit the "unpaid note" it failed to meet its initial burden. Plaintiff supports its motion by attaching a copy of the Mortgage dated April 30, 1992, which was "payable with interest according to a Bond or Note having the same date." Plaintiff also attached the Gap Mortgage and Security Agreement dated August 24, 2004, which too was payable "according to a certain note... executed this same day." Neither note, however,

---

[1] The real property is located at 1779 and 1781 Western Avenue, Guilderland, New York, and will hereinafter be referred to as "the premises."

[2] Setron Prosthetics and Orthotics Corp., Melinda Setzer and Eric Setzer will all hereinafter be collectively referred to as "Defendants."

was submitted. Consolidating the above notes and mortgages, Plaintiff attached the Mortgage Consolidation, Assumption, Spreader, Extension and Modification Agreement[3] dated August 24, 2004, payable in accord with the above notes and "the SBA Note executed by Mortgagor today." Again, the SBA Note is not attached. Because Plaintiff did not submit the above notes, it failed to establish its prima facie entitlement to judgment as a matter of law.

Plaintiff, additionally, failed to demonstrate Defendant's default. Plaintiff claims that it is entitled to judgment because Defendants admittedly did not pay the premises' property taxes. While Plaintiff asserts that such non-payment violates the Consolidation Agreement's Schedule C - Paragraph 6(a)[4], Plaintiff failed to establish a default under such provision. Paragraph 6(a) is an escrow provision. Its applicability is specifically conditioned on the following: "[i]f at any time during the existence of this [Consolidation] Agreement, the [Plaintiff] shall require the [Defendants] to establish an escrow account for the payment of taxes..." On this record, Plaintiff proffered no proof that it required Defendant to establish an escrow account for the payment of taxes. As such, it demonstrated neither the applicability of Paragraph 6(a) nor Defendants' breach thereof.

Because Plaintiff failed to meet its initial summary judgment burden, Defendants' opposition need not be considered (McNally v Kiki, Inc., 92 AD3d 1105 [3d Dept 2012]), and Plaintiff's motion is denied.

Turning to Plaintiff's motion for the appointment of a referee, it too is denied. RPAPL §1321 provides that "if the defendant fails to answer within the time allowed or the right of the

---

[3] Hereinafter "Consolidation Agreement."

[4] Hereinafter "Paragraph 6(a)."

plaintiff is admitted by the answer, upon motion of the plaintiff, the court shall ascertain and determine the amount due, or direct a referee to compute the amount due to the plaintiff." Here, Defendant has not defaulted and Plaintiff failed to establish its entitlement to summary judgment. As such, Plaintiff has not demonstrated its entitlement to the appointment of a referee.

Lastly, Plaintiff failed to establish its entitlement to amend the caption of this action. Plaintiff seeks to strike "JOHN DOE #1-#50" and "MARY ROE #1-#50" from the caption and replace them with the names: "WESTMERE FIRE DEPARTMENT, ALBANY ORTHOPEDIC APPLIANCE, and SUSAN SVINGALA." CPLR §1024 permits an action to be commenced against an unknown party, but requires the caption to describe "the unknown party [in a] sufficiently complete [manner] to fairly apprise that entity that it is the intended defendant." (Olmsted v Pizza Hut of Am., Inc., 28 AD3d 855 [3d Dept 2006]). Here, although the caption sufficiently designated "John Doe" and "Mary Roe" as tenants and occupants of the premises, Plaintiff proffered no proof in admissible form that the three proposed parties are tenants or occupants. The affidavits of service on each proposed party constitute the only relevant and admissible proof, but not one such affidavit sufficiently established the proposed parties' interest in the premises. As such, Plaintiff failed to establish that these proposed parties were fairly apprised by the caption's action and this portion of its motion is denied.

This Decision and Order is being returned to the attorneys for the Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall

not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 29, 2012
Albany, New York

JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated July 27, 2012; Affirmation of Denise Resta-Tobin, dated July 27, 2012, with attached Exhibits A-K; Affidavit of Michael D. Purtell, dated June 11, 2012, with attached Exhibits A-B; Affirmation of Denise Resta-Tobin, dated July 25, 2012, with attached Exhibit A.
2. Affidavit of Eric Setzer, dated September 18, 2012, with attached Exhibit A.
3. Affirmation of Denise Resta-Tobin, dated September 24, 2012, with attached Exhibits A-B.