FTBK Inv. II LLC v Joshua Mgt. LLC

2013 NY Slip Op 30333(U)

February 1, 2013

Supreme Court, New York County

Docket Number: 810164/11

Judge: Paul Wooten

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SCANNED ON 2/14/2013

[* 1]

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

PRESENT: HON. PAUL WOOTEN — Justice — **PART 7**

FTBK INVESTOR II LLC, AS TRUSTEE FOR NY BROOKLYN INVESTOR II TRUST 1,
Plaintiff,

INDEX NO. 810164/11

-against-

MOTION SEQ. NO. 003

JOSHUA MANAGEMENT LLC, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, CASTLE OIL CORP., NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, and "JOHN DOE NO.I" to "JOHN DOE NO. XXX," inclusive, the last thirty names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if, any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

FILED
FEB 14 2013
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 4 were read on this motion by defendant for summary judgment and to amend the answer.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: ☐ Yes ☐ No

Motion sequences 003 and 004 are hereby consolidated for purposes of disposition. In this action, FTBK Investor II, LLC, as Trustee for N.Y. Brooklyn Investor II Trust 1 (plaintiff) seeks to foreclose upon a mortgage secured by property located at 2866 Frederick Douglas Boulevard, New York, New York and owned by defendant Joshua Management, LLC (Joshua). The mortgage agreement and an Amended and Restated Promissory Note (Note) in the amount of $2,812,500.00 were originally executed by Joshua in favor of Washington Mutual Bank, F.A. (WaMu). *In motion sequence* 003, Plaintiff moves for an order granting it summary

on its complaint, striking Joshua's answer, appointing a referee to compute the sums due and owing to plaintiff, entering a default judgment against non-appearing defendants New York State Department of Taxation and Finance, New York City Environmental Control Board and New York City Department of Housing Preservation and Development and dismissing the complaint without prejudice as against defendants John DOE No.1 to John Doe No. XXX. In motion sequence 004, plaintiff moves, by Order to Show Cause (OSC), for the appointment of a temporary receiver. Joshua opposes these motions on the grounds that the plaintiff lacks standing to foreclose upon the mortgage and has failed to adequately demonstrate that Joshua is in default with respect to the Note.

BACKGROUND

On August 12, 2005, Joshua signed a promissory note and mortgage agreement in favor of WaMu in order to obtain a loan in the amount of $2,812,500.00. The loan was secured by property located at 2866 Frederick Douglass Boulevard, New York, New York. The mortgage was recorded with the Office of the City Register on August 26, 2005 (*see* Affirmation of Jerold C. Feuerstein, Esq. [Feuerstein Aff.], exhibits A, B).

On September 25, 2008, the United States Office of Thrift Supervision (OTS) seized WaMu and placed it into the receivership of the Federal Deposit Insurance Corporation (FDIC). That same day, the FDIC transferred and/or sold most of WaMu's assets, including its deposit liabilities and its secured debts and loans to JPMorgan Chase & Co. (Chase). Pursuant to 12 USC § 1821(d)(2)(G)(i)(II), the FDIC, as receiver of a failed bank, is authorized to "transfer any asset or liability of the institution in default . . . without any approval, assignment, or consent with respect to such transfer." WaMu's loans were transferred to Chase through a Purchase of Assumption Agreement (the PAA) executed by FDIC and Chase on September 25, 2008 (*id.*, exhibit C). As proof that the Note and mortgage executed by Joshua was one of the loans transferred to Chase, the plaintiff relies on an affidavit signed by Robert C. Schoppe (Schoppe

Affidavit), an authorized representative of the FDIC. The Schoppe Affidavit claims that "Chase acquired certain of the assets, including all loans and all loan commitments, of Washington Mutual." However neither the Schoppe Affidavit nor the PAA mention or refer to any specific loans.

On August 19, 2011, the subject mortgage was assigned and the Note endorsed over to N.Y. Brooklyn Investor II, LLC, a New York limited liability company (NY Brooklyn Investor). On September 12, 2011, NY Brooklyn Investor assigned the mortgage and Note over to the plaintiff (*id.*, exhibits D, E). Both of these assignments were registered and recorded on October 3, 2011 (*id.*).

Pursuant to the terms of the Promissary Note, Joshua was obligated to make monthly payments of $15,600.48, starting on October 1, 2005. Plaintiff claims that Joshua is in default because it failed to tender any monthly payments on the Note on or after December 1, 2010. The mortgage agreement provides that the mortgagors are in default when they fail to make any regular payment under the Note "so that it was received by the [lender] within 15 days after the date when due" (*id.*, exhibit B). Section 5.3 of the Mortgage, provides in pertinent part, "Upon the occurrence of any Event of Default, all sums secured hereby shall become immediately due and payable, without notice or demand... and Lender may ... (b) Foreclose this Security Instrument as provided in Section 7 or otherwise realize upon the Property. . ." (*id.*). By letter dated April 22, 2011, counsel for Chase informed Joshua that Chase was exercising its option to declare the entire principal amount of the loan in default, together with all accrued and unpaid interest and to commence a foreclosure proceeding against Joshua (*id.*, exhibit G).

Prior to its assigning the mortgage and Note to NY Brooklyn Investor, Chase commenced this action to foreclose upon the property via a summons and complaint dated May 20, 2011. In addition to Joshua, Chase named various other parties with an interest in the property as well as defendants John Doe No.1 through John Does No. XXX, as potential

tenants of or unknown creditors or lien holders on the property. On July 12, 2011, Joshua interposed an answer which, *inter alia*, raised seven affirmative defenses: (1) failure to state a cause of action; (2) unclean hands; (3) denial of default and, alternatively that default was "wrongfully induced by the Plaintiff; (4) denial of any non-monetary default; (5) failure to provide notice and a cure period; (6) reservation of the right to amend the answer to include new affirmative defenses; and (7) denial of waiver of affirmative defenses. On November 16, 2011, this Court signed an order amending the caption of this action to reflect the substitution of FTBK Investor II, LLC, as trustee for NY Brooklyn Investor II Trust I as the plaintiff in the action.

In motion sequence 003, plaintiff moves for an order granting summary judgment, striking Joshua's answer, and appointing a referee to compute the sums due and owing to Plaintiff. Joshua opposes this relief. Plaintiff also seeks an order dismissing the John Doe defendants without prejudice and entering a default judgment against defendants New York State Department of Taxation and Finance, New York City Environmental Control Board and New York City Department of Housing Preservation and Development, all of whom have failed to answer the complaint or otherwise appear in this action. Joshua does not offer any opposition to the granting of this relief. In motion sequence 004, Plaintiff moves, by OSC for the appointment of a temporary receiver for the property. Joshua opposes.

CONTENTIONS OF THE PARTIES

Plaintiff asserts that it is the valid holder of the Note and mortgage, signed by Joshua, that Joshua has failed to make the required payments pursuant to the Note and is therefore in default. As such, plaintiff proffers that it has established a *prima facie* case that it is entitled to foreclose on the property. Plaintiff also maintains that Joshua's answer does not raise any meritorious defenses that would negate the plaintiff's *prima facie* showing. In addition to producing the indorsed Note, the mortgage agreement, and the two mortgage assignments, plaintiff has also submitted an affidavit from Brian Shatz (Shatz), the managing member of the

plaintiff trustee. Shatz states that he has personal knowledge of the existence of Joshua's default and the amount of the principal balance due "based upon Plaintiff's books and records" (Feuerstein Aff., Shatz Affid., ¶ 21). Shatz states in his affidavit that he reviewed files maintained in the ordinary course of business by plaintiff and Chase that relate to the loan that is the subject of this action.

Joshua contends that summary judgment should be denied because plaintiff has failed to provide any proof that the mortgage and note were transferred from the FDIC to Chase, plaintiff's predecessor-in-interest, and therefore plaintiff has failed to sufficiently demonstrate that it has standing to foreclose on the mortgage. Joshua further claims that plaintiff lacks standing because there is no endorsement or allonge on the Note evidencing its valid assignment to Chase. Furthermore, Joshua claims that Shatz's affidavit is insufficient proof of Joshua's default on the Note because he has not demonstrated sufficient personal knowledge of the circumstances surrounding Joshua's alleged default.

In reply, plaintiff claims that a formal assignment of the mortgage and note to Chase was not necessary to effectuate a transfer. Plaintiff also submits a Supplemental Affidavit from Shatz. In his Supplemental Affidavit, Shatz claims that he reviewed the files concerning the subject loan before plaintiff acquired the loan from NY Brooklyn Investor, including all loan related files such as the underwriting file, loan documents, payment histories, default and acceleration letters and other correspondences. Shatz indicates in the Supplemental Affidavit, that the documents he reviewed were presented to him as "business records of the predecessors in interest to NY Brooklyn (and Plaintiff for that matter) and they appeared to [him] to be consistent with similar business records customarily held in the mortgage lending industry" (Feuerstein Reply Aff., Shatz Sup. Affid. at p. 3).

With regards to the appointment of a temporary receiver, plaintiff relies on section 5.3 of the mortgage agreement which states that in the event of a default " Mortgagee may ... [h]ave a

receiver appointed as a matter of right on an ex parte basis without notice to Mortgagor and without regard to the sufficiency of the Property or any other security for the indebtedness secured hereby and, without the necessity of posting a bond or security, such receiver shall take possession and control of the Property and shall collect and receive all of the rents, issues and profits thereof" (Feuerstein Aff., exhibit B). Plaintiff contends that this provision, read in conjunction with Real Property § 254(10), entitles it to have a receiver appointed for the Property regardless of the sufficiency of the current property management. Moreover, plaintiff asserts that Joshua has failed to properly manage the subject property. Joshua again contends that plaintiff provides insufficient proof that it is the valid holder of the note and mortgage. Joshua also disputes plaintiff's contentions that it is not managing the property effectively, and argues that the appointment of a receiver could disrupt its management and is otherwise not necessary to protect the plaintiff's collateral.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR

3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos,* 46 NY2d 223, 231 [1978]).

In moving for summary judgment in a mortgage foreclosure action, plaintiff establishes a prima facie right to foreclose by producing the mortgage, the assignment, if any, the unpaid note and evidence of default (*see CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]; *LPP Mortgage, Ltd v Card Corp.*, 17 AD3d 103, 104 [1st Dept 2005]; *Hypo Holdings, Inc. v Chalasani,* 280 AD2d 386 [1st Dept 2001]). Once the plaintiff satisfies that burden, it is incumbent on the party opposing foreclosure to come forward with evidence sufficient to raise a triable issue of fact as to a bona fide defense such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff (*see CitiFinancial,* 27 AD3d at 226; *Mahopac Nat. Bank v Baisely*, 244 AD2d 466, 467 [2nd Dept 1997]). Where the defendant has put standing into issue, the plaintiff can demonstrate its standing and entitlement to relief by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced (*see U.S. Bank , N.A. v Collymore*, 68 AD3d 752, 753 [2nd Dept 2009]; *see also Bank of New York v Silverberg*, 86 AD3d 274, 279 [2nd Dept 2011]; *Countrywide Home Loans, Inc. v Gress*, 68 Ad3d 709, 709 [2nd Dept 2009]).

DISCUSSION

Usually, an assignment of a mortgage and underlying note can be effectuated either

through a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action (*Collymore*, 68 AD3d at 754). Joshua argues that the plaintiff cannot establish that it has standing because it cannot demonstrate that the mortgage and underlying note was validly assigned to Chase, plaintiff's predecessor-in-interest, prior to the commencement of this action. Plaintiff has provided a written assignment of both the mortgage and the underlying Note from Chase to NY Brooklyn Investor and from NY Brooklyn Investor to plaintiff. However, plaintiff does not have written proof of the assignment to Chase from either WaMu or the FDIC, as receiver. The only proof that plaintiff has offered regarding the transfer of the subject loan from WaMu to the FDIC and/or Chase is the affidavit by Schoppe, the FDIC representative. As stated above, the Schoppe affidavit does not refer to any specific loans or mortgages but merely asserts that all of WaMu's loans were transferred to Chase after WaMu's seizure by the FDIC.

Joshua acknowledges that the plaintiff is in physical possession of the note and mortgage, but argues that the motion must be denied because the plaintiff has not provided any admissible evidence such as an affidavit or documents which would demonstrate that the loan documents were delivered to Chase prior to the commencement of this action. Plaintiff may have demonstrated that it was validly assigned the loan from Chase and NY Brooklyn Investor, but Joshua insists that plaintiff must also demonstrate that Chase was validly assigned the note and mortgage from WaMu and/or the FDIC as receiver prior to the commencement of this action.

Based on the above facts, Joshua argues that the evidence proffered by the plaintiff to demonstrate its standing is insufficient. The Court disagrees. Plaintiff correctly points out that the FDIC clearly had the authority to transfer the loans in bulk to Chase pursuant to 12 USC § 1821(d)(2)(G)(i)(II), and that an individual negotiation, i.e. assignment, of each loan was not required. Pursuant to 12 USC § 1821(d)(2)(G)(i)(II), the FDIC, as receiver of a failed bank, is

authorized to "transfer any asset or liability of the institution in default . . . without any approval, assignment, or consent with respect to such transfer." According to the express terms of the statute, a valid transfer of the assets of a failed bank from the FDIC occurs even without a formal assignment instrument. As evidenced by the terms of the PAA, Chase acquired all assets of WaMu, with certain exceptions not applicable to this action. Specifically, section 3.1 of the PAA provides that, with the exception of the assets not applicable to this action, "[Chase] hereby purchases from the receiver [FDIC], and the Receiver *hereby* sells, assigns, transfers, conveys, and *delivers* to the Assuming Institution, all right, title, and interest of the Receiver in and to all of the assets. . .of the Failed Bank [WaMu]" (Reply papers).

Citing to *JP Morgan Chase Bank, N.A. v 334 Marcus Garvey Boulevard Corp.* (Sup Ct, Kings County, Dec. 5, 2011, Rosenberg, J., index No. 26152/09) and *JP Morgan Chase Bank, N.A. v 1770 Realty Corp.* (Sup Ct, Kings County, Jan. 29, 2010, Gerges, J., index No.7655/09), plaintiff argues that it can therefore prove Chase's prior ownership of notes and mortgages obtained from WaMu without having to show that the loan documents were individually negotiated and assigned. The Court agrees with plaintiff. There is sufficient documentation to establish that OTS closed WaMu on September 25, 2008 and appointed the FDIC as WaMu's receiver. That same day, the FDIC transferred the bulk of WaMu's assets to Chase pursuant to the PAA. Joshua does not challenge the legality of the transfer or the PAA itself and indeed numerous courts have accepted these transactions as legitimate conveyances of WaMu assets to Chase (*see 290 at 71 v JP Morgan Chase Bank*, 2009 WL 3784347, Case No A-09-CA=576-SS [WD Texas 2009] [finding that PAA validly transferred lease from WaMu to Chase]; *Grealish v WaMu, FA*, 2009 WL 2170044, Case No 2:08-CV-763 TS [D Utah 2009]; *Hilton v Washington Mut. Bank*, 2009 WL 3485953, No C09-1191 SI [ND Cal 2009]). Accordingly, Joshua's claim that the Note had to have been individually negotiated and physically endorsed to Chase through an allonge is legally incorrect.

Joshua argues that even if plaintiff is correct that Chase received a valid transfer of WaMu's assets from the FDIC, this does not rule out the possibility that the mortgage could have been transferred to another lender prior to WaMu's seizure by the FDIC. Thus Joshua argues that plaintiff must provide proof of Chase's prior ownership of the Note and mortgage beyond the PAA and/or the Schoppe affidavit. There is some caselaw supporting Joshua's position, but the Court does not find it persuasive (*see FTBK Investor II LLC v Mercy Holding LLC*, 36 Misc3d 1219(A) * 5 [Sup Ct. Kings County 2012]). In making this argument based on its analysis of state law, Joshua overlooks the broad powers granted to OTS which enjoys "plenary and exclusive authority . . . to regulate all aspects of the operations of Federal savings associations" and its authority "occupies the entire field of lending regulation for federal savings associations" (*see* 12 CFR §§ 545.2, 560.2[a]). To this end, OTS Regulation 560.2(b) expressly preempts state regulation of federal thrift activities dealing with lending by federal savings associations including, *inter alia*, terms of credit, loan related fees, disclosure or advertising and processing, origination or servicing of loans (*see* 12 CFR § 560.2(b); *see also Monroig v Washington Mut. Bank, FA*, 19 AD3d 563, 564 [2nd Dept 2005]). There can be no dispute that 12 USC § 1821(d)(2)(G)(i)(II), as it pertains to the broad authority of the OTS and FDIC to transfer mortgages without assignment, pertains to lending, and thus any contrary New York state law or judicial decision would be preempted by federal law (*see JP Morgan Chase Bank, N.A. v 1770 Realty Corp.*, Sup Ct, Kings County, Jan. 29, 2010, Gerges, J., index No.7655/09, *slip op* at 16-18; *JP Morgan Chase Bank, N.A. v 334 Marcus Garvey Boulevard Corp.*, Sup Ct, Kings County, Dec. 5, 2011, Rosenberg, J., index No. 26152/09, slip op at 7-8). Thus, the Court finds that Joshua's contention that the transfer of the mortgage and Note to Chase must be negotiated and/or recorded individually to demonstrate proof of assignment is without merit.

Furthermore, as plaintiff points out, while Joshua argues that the plaintiff has failed to

prove valid ownership of the subject loan documents, Joshua fails to give any rational explanation as to how Chase and then the plaintiff obtained possession of the loan documents if in fact WaMu transferred the loan prior to its collapse as Joshua suggests. Faced with plaintiff's strong *prima facie* showing as to ownership, Joshua cannot point to any credible evidence which suggests that the underlying note was not assigned to Chase from the FDIC and thereafter, from Chase to NY Brooklyn Investor, and then to plaintiff.

However, Joshua also claims that plaintiff has failed to provide sufficient documentary evidence of Joshua's alleged default on payment of the note, arguing that the Shatz affidavit is insufficient to demonstrate default because Shatz had no involvement with the loan and mortgage at the time of the purported default, and thus lacks sufficient personal knowledge of the circumstances concerning Joshua's alleged default. In his original affidavit, Shatz says only that he reviewed the files of the plaintiff and Chase, as plaintiff's predecessor-in-interest and knows that the allegations in the complaint concerning Joshua's default are true based on his review of the plaintiff's books and records (*see* Shatz Affidavit). As a member of the plaintiff assignee, Shatz only reviewed the loan documents created by Chase long after the alleged default took place and has no personal knowledge of the circumstances surrounding the default and or the acceleration of the mortgage by Chase. Furthermore Shatz can not represent that the records that he reviewed were kept by Chase in the ordinary course of business and his affidavit does not even specify or attach copies of the documents upon which he relies (*see FBTK Investor II*, 2012 WL 3064864 at * 5). Even if the documents were attached, they would not be admissible as business records of Chase without an affidavit of a Chase employee indicating that such records were kept in the regular course of Chase's business (*see* CPLR 4518[a]; *Lodato v Greyhawk N.Am., LLC*, 39 AD3d 494, 495 [2nd Dept 2007]). Moreover, Shatz lacks personal knowledge of the facts of the subject mortgage and note prior to its transfer to NY Brooklyn Investor. While the supplemental affidavit of Shatz attempts to cure

some of the deficiencies, it is still inadequate and a party can not be permitted to make out his prima facie case on reply (*see Cotter v Brookhaven Mem. Hosp. Med. Ct., Inc.*, 97 AD3d 524 [2d Dept 2012]; *Hawthorne v City of New York*, 44 AD3d 544 [1st Dept 2007]). Therefore, plaintiff cannot meet its burden to demonstrate that Joshua defaulted on the note, and accordingly its motion for summary judgment should be denied without prejudice with leave to renew. Plaintiff's motion seeking an order dismissing the John Doe defendants without prejudice and entering a default judgment against defendants New York State Department of Taxation and Finance, New York City Environmental Control Board and New York City Department of Housing Preservation and Development is granted without opposition.

In motion sequence 004, plaintiff moves for the appointment of a temporary receiver pursuant to section 5.3(a) of the mortgage agreement and Real Property Law 254(10). Since the language in the mortgage agreement allowing for the appointment of a receiver without regard to the sufficiency of the property is contingent upon proof of default, and plaintiff has not yet demonstrated that Joshua defaulted on the mortgage, the application for appointment of a temporary receiver is also denied without prejudice with leave to renew.

CONCLUSION

Accordingly, it is

ORDERED that the portions of plaintiff's motion in Motion Sequence 003 seeking summary judgment on its complaint, striking defendant Joshua's answer, and seeking the appoint a referee to compute sums due and owing to plaintiff are denied without prejudice with leave to renew; and it is further,

ORDERED that the portion of plaintiff's motion in Motion sequence 003 seeking to dismiss the complaint without prejudice as against defendants John Doe No.1 to John Doe No. XXX is granted without opposition; and it is further,

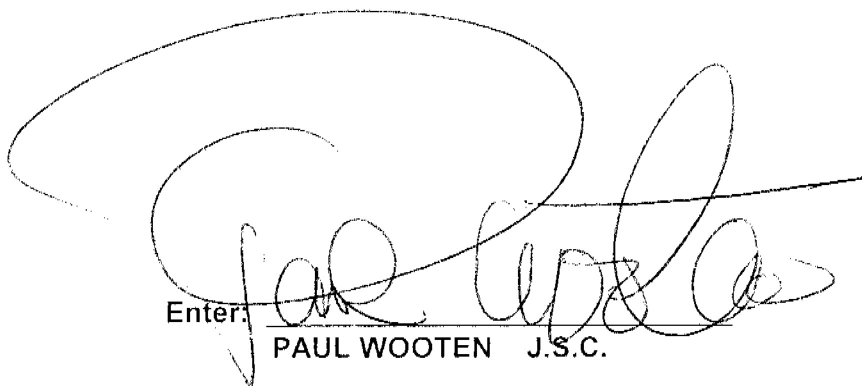
ORDERED that the portion of plaintiff's motion in Motion Sequence 003 seeking a

default judgment as against defendants New York State Department of Taxation and Finance, New York City Environmental Control Board and New York City Department of Housing Preservation and Development is granted without opposition; and it is further,

ORDERED that Motion Sequence 004 is denied in its entirety without prejudice with leave to renew; and it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly; and it is further,

ORDERED that the parties are directed to appear for a Status Conference on March 13, 2013 at 11:00 a.m., at 60 Centre Street, Room 341, Part 7.



Dated: 2/1/13

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