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; SUSAN SVINGALA; "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, February 8, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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Douglas J. Rose, Esq.
Attorneys for Defendants Sentron Prosthetics and Orthotics Corp., Melinda Setzer and Eric Setzer
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TERESI, J.:

The Bank of Bennington (hereinafter "Plaintiff") commenced this action to foreclose its mortgage on real property[1] owned by Setron Prosthetics and Orthotics Corp. (hereinafter "Setron"). Issue was joined by Setron, Eric Setzer and Melinda Setzer (hereinafter collectively "Defendants"). Plaintiff now moves for summary judgment, appointment of a referee, and to amend the caption. Defendants oppose the motion. Because Plaintiff demonstrated its entitlement to a judgment of foreclosure as a matter of law, and Defendants raised no triable issue of fact, Plaintiff's motion for summary judgment is granted. As is its motion for the appointment of a referee to compute. However, Plaintiff only partly demonstrated its entitlement to amend the caption of this action.

"Entitlement to a judgment of foreclosure may be established, as a matter of law, where a mortagee 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." (HSBC Bank USA v Merrill, 37 AD3d 899, 900 [3d Dept 2007]; Charter One Bank, FSB v Leone, 45 AD3d 958 [3d Dept 2007]; Citibank, N.A. v Van Brunt Properties, LLC, 95 AD3d 1158 [2d Dept 2012]).

On this record, Plaintiff demonstrated its entitlement to a judgment of foreclosure by first producing the relevant note and mortgages. Plaintiff first proffered Setron's initial mortgage with Rudy Setzer, dated April 30, 1992, and its August 11, 2004 assignment to Plaintiff. Additionally, Plaintiff submitted its Gap Mortgage and Security Agreement with Setron, dated

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

August 24, 2004 (hereinafter "Gap Mortgage"), along with the related Mortgage, Consolidation, Assumption, Spreader, Extension and Modification Agreement, dated August 24, 2004 (hereinafter "Modification Agreement"), and August 24, 2004 Note. As conceded by Defendant, the relevant note has been submitted.

Plaintiff also sufficiently demonstrated Setron's default under the provisions of the Gap Mortgage and the Modification Agreement. Both, at paragraph 12(b), state "[i]f any one or more of the following events of default...shall occur, the whole of the outstanding principal sum and the accrued interest and all other sums due under the Note and under the other Loan Documents shall become immediately due and payable at the option of the Mortgagee:... (b) a failure to exhibit to the Mortgagee, within fifteen (15) days after the due date of all taxes relative to the Mortgaged Property, receipts showing payment of taxes and any other assessments or license fees relating to the Mortgaged Property" (hereinafter "12(b)"). To establish Setron's default under 12(b), Plaintiff submitted its Vice President's affidavit. He alleged, based on his review of the Plaintiff's business records, that Setron failed to pay the premises' property taxes in 2008, 2009, 2010 and 2012. He supported his assertion with two County of Albany "2012 Delinquency Notices," which state that there "is an unpaid tax bill from 2012 or prior" in the combined amount of $52,715.23. While such proof does not directly demonstrate Setron's failure to proffer the requisite 12(b) notice of payment, it does establish that Setron could not truthfully give such notice. As such, Plaintiff demonstrated its entitlement to judgment as a matter of law.

With the burden shifted, Defendants raised no triable issue of fact. Importantly, Defendants' do not deny their failure to pay the premises' taxes. Rather, they opine that the premises "is not in any immediate danger of tax foreclosure." However, the alleged non-threat of

tax foreclosure raises no triable issue of fact. Nor do the Defendants' assertions that they are seeking to sell the premises and are timely servicing their debt. These allegations are wholly irrelevant to Setron's non-payment of taxes and their 12(b) breach.

Accordingly, Plaintiff's motion for summary judgment is granted.

With Plaintiff's motion for summary judgment granted, a referee must be appointed. (Neighborhood Housing Services of New York City, Inc. v Meltzer, 67 AD3d 872 [2d Dept 2009]; Vermont Fed. Bank v Chase, 226 AD2d 1034 [3d Dept 1996). Accordingly, Plaintiff shall submit a proposed order of reference, to chambers, within fourteen days of the date of this Decision and Order.

Lastly, Plaintiff only established its entitlement to amend the caption of this action in part. While Plaintiff seeks to replace its John Doe and Mary Roe defendants with ALBANY ORTHOPEDIC APPLIANCE (hereinafter "AOA") and SUSAN SVINGALA (hereinafter "Svingala"), it only proffered sufficient admissible proof to support the addition of Svingala. Plaintiff proffered a "Change of Address" form, bearing a United States Postal Service stamp, showing that the premises was Svingala's last known address as of December 20, 2012. This, along with Plaintiff's Affidavit of Service that alleges personal service of the within pleadings on Svingala at the premises, demonstrates that Svingala was sufficiently described as a tenant or occupant in the caption. (Olmsted v Pizza Hut of Am., Inc., 28 AD3d 885 [3d Dept 2006]). No such proof, however, was submitted for AOA. Plaintiff's AOA Affidavit of Service alleged delivery to Eric Setzer as "owner duly authorized to accept legal process." However, no further proof of AOA's tenancy or occupancy at the premises was provided. As such, Plaintiff failed to sufficiently demonstrate that AOA was sufficiently described in the caption.

Accordingly, Plaintiff's motion to add Svingala as a named party is granted but its motion to add AOA is denied.

This Decision and Order is being returned to the attorneys for the Plaintiff. 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: March 27, 2013
Albany, New York

Joseph C. Teresi
JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated January 2, 2013; Affirmation of Denise Resta-Tobin, dated January 2, 2013 with attached exhibits A-R (out of order); Affirmation of Denise Resta-Tobin, dated January 2, 2013, with attached exhibit A; Affidavit of Michael Purtell, dated June 11, 2012, with attached exhibits A-B.
2. Affidavit of Eric Setzer, dated January 18, 2013.