

Onewest Bank, FSB v Robert
2013 NY Slip Op 30656(U)
March 20, 2013
Supreme Court, Richmond County
Docket Number: 130029/11
Judge: Thomas P. Aliotta
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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ONEWEST BANK, FSB,

TP 12

Plaintiff,

**Present:
HON. THOMAS P. ALIOTTA**

-against-

**LUZ ROBERT a/k/a LUZ M. ROBERT a/k/a
LUZ CRUZ ROBERT, RIGAULBERT ROBERT
a/k/a RIGAULBERT M. ROBERT, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.
as Nominee for INDYMAC BANK, FSB, CITY OF
NEW YORK ENVIRONMENTAL CONTROL BOARD,
CITY OF NEW YORK DEPARTMENT OF
TRANSPORTATION PARKING VIOLATIONS
BUREAU, CITY OF NEW YORK TRANSIT
ADJUDICATION BUREAU,
"JOHN DOE", "RICHARD ROE", "JANE DOE",
"CORA COE", "DICK MOE" AND "RUBY POE",
the six defendants last named in quotation marks being
intended to designate tenants or occupants in possession
of the herein described premises or portions thereof,
if any thereby, said names being fictitious, their true
name being unknown to plaintiff,**

DECISION AND ORDER

Index No. 130029/11

**Motion Nos. 2738 - 002
3460 - 003**

Defendants.
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The following papers numbered 1 to 4 were marked fully submitted the 16th day of
January, 2013.

Papers Numbered

Plaintiff's Notice of Motion for Summary Judgment and the
Appointment of a Referee to Compute, with Supporting Papers
(dated September 6, 2012)..... 1

Notice of Cross Motion by Defendants Luz Robert a/k/a Luz A. Robert
a/k/a Luz Cruz Robert, Rigaulbert Robert a/k/a Rigaulbert M. Robert
to, *inter alia*, Dismiss the Complaint, with Supporting Papers
(dated November 27, 2012)..... 2

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Plaintiff's Affirmation in Opposition and Reply Affirmation (dated December 28, 2012).....	3
Reply Affirmation by Defendants Luz Robert a/k/a Luz A. Robert a/k/a Luz Cruz Robert, Rigaultbert Robert a/k/a Rigaultbert M. Robert (dated January 15, 2013).....	4

Upon the foregoing papers, plaintiff's motion (Seq. No. 002) for, *inter alia*, summary judgment and the appointment of a referee to compute is granted; the cross motion (Seq. No. 003) by defendants Luz Robert and Rigaultbert Robert to dismiss the complaint is denied.

This action to foreclose a certain mortgage on real property located at 15 Freeman Place, Staten Island, New York was commenced on January 7, 2011. It is undisputed that said mortgage was given by defendants Luz Robert and Rigaultbert Robert on April 16, 2007 to plaintiff's predecessor-in-interest, Indymac Bank, F.S.B., to secure a note executed by them in the principal sum of \$456,000.00. On February 16, 2011 defendants moved *pro se* to dismiss the complaint on the grounds, *inter alia*, that plaintiff "is not the 'holder' of the actual note and mortgage" and therefore, "lacks standing to collect the debt". Although the foreclosure action had been assigned to the Foreclosure Conference Part of this Court pursuant to CPLR 3408, it was released on March 30, 2011 without conducting a settlement conference when defendants chose to proceed without counsel and litigate the case. On June 1, 2011, after hearing oral argument, this Court denied defendants' motion, and directed that an answer be served within 30 days, which defendants did on or about June 30, 2011.

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Nevertheless, upon retaining counsel, defendants interposed an (amended) verified answer containing 21 affirmative defenses and 7 counterclaims.

On or about September 6, 2012, plaintiff moved for summary judgment and the appointment of a referee to compute. That motion was returnable before this Court on October 24, 2012, and was granted by Order dated December 3, 2012. However, it appears that during the interim, *i.e.*, on or about November 27, 2012 and unbeknownst to the Court, defendants served a belated cross motion for summary judgment and dismissal of the complaint, which was made returnable on December 5, 2012. Upon learning of these facts, this Court, in the interest of justice, determined to vacate the Order dated December 3, 2012 and restore plaintiff's motion for summary judgment to the calendar. The motion and cross motion were thereupon adjourned to January 16, 2013 for oral argument, and decision was reserved.

It is well settled that in moving for summary judgment in an action to foreclose a mortgage, the plaintiff/mortgagee establishes its right to judgment as a matter of law through the production of the subject mortgage, the unpaid note executed by the defendant/mortgagor and evidence of the default (*see* Flagstar Bank v Bellafiore, 94 AD3d 1044, 1045; HSBC Bank USA, NA v Schwartz, 88 AD3d 961; Coppa v Fabozzi, 5 AD3d 718).

Consonant with the foregoing principles, it is the opinion of this Court that plaintiff has established its entitlement to judgment as a matter of law by tendering (1) copies of the subject mortgage and related note endorsed in blank, (2) the required default and pre-

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foreclosure notices, and (3) proof of the default and the regularity of these proceedings in the form of the affidavit of plaintiff's assistant secretary, Forrest McKnight (*see JP Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662, 663; *Chiarelli v Kotsifos*, 5 AD3d 345, 345-346; *Charter One Bank v Houston*, 300 AD2d 429, 430, *lv dismissed* 99 NY2d 651).

In opposition to plaintiff's motion and in support of their cross motion, defendants have failed to demonstrate the existence of a material issue of fact requiring a trial (*see Aames Funding Corp. v Houston*, 44 AD3d 692, 693, *lv denied* 10 NY3d 704; *Charter One Bank, FSB v Houston*, 300 AD2d at 430). More specifically, defendants' present attempt to re-litigate their challenge to plaintiff's standing is barred by this Court's previous rejection of this contention in their *pro se* motion to dismiss. In addition, the remainder of their affirmative defenses and counterclaims constitute bare legal conclusions lacking in either evidentiary facts or documentary proof in support.

Finally, defendants' contention that disclosure should be conducted prior to the determination of plaintiff's summary judgment motion is unavailing. Summary judgment cannot be avoided by a claimed need for discovery where, as here, there is no evidentiary basis to suggest that disclosure may lead to the production of relevant evidence (CPLR 3212[f]; *see Auerbach v Bennett*, 47 NY2d 619).

Accordingly, it is

ORDERED, that the Order of this Court dated December 3, 2012 is vacated and set aside, and it is further

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ORDERED, plaintiff's motion for, *inter alia*, summary judgment and the appointment of a referee to compute is granted; and it is further

ORDERED, that the cross motion by defendants Luz Robert and Rigaulbert Robert to dismiss the complaint is denied.

Settle Order

E N T E R,

Dated: March 20, 2013

Hon. Thomas P. Aliotta
J.S.C.