STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

LEON MARTELL,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 5467-12
RJI NO. 01-13-110136

RALPH DRAKE, UNITED STATES OF AMERICA, ESTATE OF GLADYS MOAK, COUNTY OF ALBANY, CAPITAL ONE BANK (USA) N.A. and JOHN DOE AND JANE DOE said names being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein,

Defendants.

Supreme Court Albany County All Purpose Term, June 10, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Gerard F. Parisi, Esq.
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Waite and Associates
Attorneys for Defendant Ralph Drake
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TERESI, J.:

Plaintiff commenced this action to foreclose the mortgage he holds on Ralph Drake's (hereinafter "Drake") real property located at 15 Fuller Road, Colonie, New York (hereinafter "the Property"). Issue was joined by Drake, who set forth one counterclaim and two affirmative defenses. Plaintiff now moves for summary judgement against Drake, for default judgments

against the remaining defendants, the appointment of a referee to compute and to amend the caption of the action. Only Drake opposed the motion. Because Plaintiff demonstrated his entitlement to summary judgement, to default judgments against the non-fictitiously named defendants and to the appointment of a referee, these portions of his motion are granted. Plaintiff failed to demonstrate, however, his entitlement to amend the caption or to default judgments against the fictitiously named defendants.

Considering Plaintiff's summary judgment motion first, it is well established that "[e]ntitlement 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" (Zanfini v Chandler, 79 AD3d 1031, 1031 [2d Dept 2010], quoting HSBC Bank USA v Merrill, 37 AD3d 899 [3d Dept 2007]; Phelps Corp. v Jones, _AD3d _ [3d Dept 2013]; Cititbank, N.A. v Van Brunt Properties, LLC, 95 AD3d 1158 [2d Dept 2012]; Pritchard v Curtis, 95 AD3d 1379 [3d Dept 2012]; Charter One Bank, FSB v Leone, 45 AD3d 958 [3d Dept 2007]; La Salle Bank Nat. Ass'n v Kosarovich, 31 AD3d 904 [3d Dept 2006]), along with proof "that the transaction was not usurious." (Abir v Malky, Inc., 59 AD3d 646, 649 [2d Dept 2009]). If such showing is made, the burden then shifts to "the defendants to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense." (Solomon v Burden, 104 AD3d 839 [2d Dept 2013]; Citibank, N.A. v Van Brunt Properties, LLC, 95 AD3d 1158, 1159 [2d Dept 2012]).

On this record, Plaintiff met his initial burden. Plaintiff supported his motion with a copy of the Mortgage, dated February 26, 2008, and the Note, dated February 27, 2008. Plaintiff's verified complaint then established Drake's default. He explained that at the end of the Note's

one year term Drake made neither the requisite $125,000 principal payment nor the remaining $9,375 interest payment. Plaintiff alleges that since the Note became due Drake paid only $3,000, of his $134,375 obligation. Such proof amply establishes Drake's default.

Plaintiff also demonstrated that the Note is not usurious. "A transaction is usurious under civil law when it imposes an annual interest rate exceeding 16%." (Abir v Malky, Inc., supra at 649; GOL §5-501[1]; Banking Law §14-a[1]). Here, in accord with the Note's terms, Plaintiff lent Defendant $125,000, to be repaid one year later at a fifteen percent interest rate ($18,750). One half of such interest ($9,375) was required to be paid upon execution of the Note, with the remaining interest ($9,375) to be paid at the end of the one year term. Contrary to Defendant's contention, his up front interest payment neither constitutes an initial discount nor increases the effective interest rate on his loan. (Shifer v Kelmendi, 204 AD2d 300, 301 [2d Dept 1994]); Band Realty Co. v North Brewster, Inc., 37 N.Y.2d 460 [1975]). As such, the Note's effective interest rate is calculated as:

Principal (no initial discount)	$125,000
Initial Interest Payment	$9,375
Remaining Interest	$9,375
Total Interest (Initial Payment plus Remaining Interest)	$18,750
Effective Interest Rate (Total Interest divided by Principal)	15.0%

(Shifer v Kelmendi, supra 301). Because the initial and remaining interest payments aggregate to fifteen percent of the principal, Plaintiff demonstrated that the Note's terms were not usurious. Moreover, the Note's late payment penalty is not usurious because it accrued only "after maturity of the note." (Klapper v Integrated Agricultural Management Co., 149 AD2d 765 [3d Dept 1989]). Such showing established Plaintiff's prima facie entitlement to a judgment of foreclosure and dismissal of Drake's affirmative defenses and counterclaim.

With the burden shifted, Drake failed to demonstrate the existence of a viable defense or a triable issue of fact. Conspicuously absent from Drake's opposition is any allegation that he made the Note's required payments. Instead, Drake's two affirmative defenses, his counterclaim and opposition all contend that the Note's terms are usurious. He offers, however, no additional proof to support his position. Because the Note's terms are not usurious, as fully explained above, Drake raised no viable defense or triable issue of fact.

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

Plaintiff also demonstrated his entitlement to default judgments against each of the non-fictitiously named defendants. On this record, Plaintiff submits both the United States of America's and the Estate of Gladys Moak's Notices of Appearance. Both reserved their respective rights to receive certain papers herein, but did not otherwise deny the complaint's allegations. Such Notices are deemed to admit the complaint's allegations (CPLR §3018[a]), and effectively consent to the judgement Plaintiff seeks. Plaintiff also demonstrated that the County of Albany and Capital One Bank (USA) were properly served, with their process server's affidavits, but defaulted in this action. Accordingly, Plaintiff's motion for default judgment against each of the non-fictitiously named defendants is granted.

With Plaintiff's motions for summary judgment and default judgment against the non-fictitiously named defendants granted, a referee must be appointed. (Neighborhood Housing Services of New York City, Inc. v Meltzer, 67 AD3d 872 [2d Dept 2009]; US Bank, NA v Boyce, 93 AD3d 782 [2d Dept 2012]; Vermont Fed. Bank v Chase, 226 AD2d 1034 [3d Dept 1996]; Bank of E. Asia v Smith, 201 AD2d 522 [2d Dept 1994]). Accordingly, Plaintiff's motion for the appointment of a referee is granted.

Plaintiff failed to demonstrate, however, his entitlement to amend the caption of this action to add Maria Figueroa and Neftali "Doe" or to a default judgment against them. CPLR §1024 authorizes the commencement of an action against a fictitiously named 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]; Benware v Schoenborn, 198 AD2d 710 [3d Dept 1993]). Here, the "John Doe" and "Jane Doe" defendants were described as "possible tenants or occupants of the mortgaged premises." Plaintiff proffered no proof in admissible form, however, to establish that Maria Figueroa and Neftali "Doe" are tenants or occupants of the Property. The affidavits of service on each constitute the only relevant and admissible proof, but neither affidavit sufficiently alleged the proposed parties' interest, tenant or occupant, in the Property. As such, Plaintiff failed to establish that these proposed parties were fairly apprised by the caption and this portion of its motion is denied. Without such amendment, a default judgment is premature. Moreover, Plaintiff failed to demonstrate compliance with, or the inapplicability of, the additional notice required under CPLR §3215(g)(3)(i) and (iii).

In accord with the above, Plaintiff shall submit a proposed Order to this Court within fourteen days of the date of this Decision and Order.

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: July 12, 2013
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated May 13, 2013; Affidavit of Gerard F. Parisi, undated, with attached Exhibits A-M.
2. Affidavit of Ralph Drake, dated June 3, 2013, with attached Exhibit A.
3. Affirmation of Gerard F. Parisi, dated June 4, 2013.