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| <b>TD Bank, N.A. v Scotto</b>  |
| 2013 NY Slip Op 31638(U)   |
| July 16, 2013  |
| Sup Ct, Suffolk County   |
| Docket Number: 25309-11  |
| Judge: Jerry Garguilo  |
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SHORT FORM ORDER

INDEX  
NO.: 25309-11

**SUPREME COURT - STATE OF NEW YORK**  
**IAS PART 47 - SUFFOLK COUNTY**

**PRESENT: HON. JERRY GARGUILO**  
Supreme Court

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TD BANK, N.A. SUCCESSOR BY MERGER  
AND ACQUISITION TO COMMERCE  
BANK, N.A.,

Plaintiff,

-against-

MOTION DATE: 1-19-12  
ADJ. DATE: 7-10-13  
MOT. SEQ. # 001 MG

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JOHN SCOTTO;  
STRENGTH & STAMINA LLC;  
WELLS FARGO BANK, NATIONAL  
ASSOCIATION; HSBC BANK USA,  
NATIONAL ASSOCIATIONS;  
MORRISON COHEN LLP  
and "JOHN DOE #1" THROUGH "JOHN  
DOE #100", the names of the last 100  
defendants being fictitious, the true names  
of said defendants being unknown to  
plaintiff, it being intended to designate  
fee owners, tenants or occupants of  
the lien premises and/or persons or  
parties having or claiming an interest  
in or lien upon the lien premises, if the  
aforesaid individual defendants are living,  
and if any or all of said individual defendants  
be dead, their heirs at law, next of kin,  
distributees, executors, administrators,  
trustees, committees, devisees, legatees,  
and the assignees, lienors, creditors and  
successors in interest of them, and generally  
all persons having or claiming under, by,  
through, or against the said defendants named  
as a class, of any right, title or interest in or  
lien upon premises described in the complaint herein,

Defendants.

\_\_\_\_\_ x

JH

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Upon the following papers numbered 1 to 29 read on this motion for summary judgment, appoint a referee to compute and other affirmative relief; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers 18-26; Answering Affidavits and supporting papers 0; Replying Affidavits and supporting papers 27-29; Other 0; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion by plaintiff for: (1) an Order pursuant to CPLR 3212 striking the answer and counterclaim and limiting the appearance of defendant, John Scotto, to a notice of appearance with waiver of service of all papers and of notices of all proceedings in said action except a copy of the Referee's Oath and Report of amount due, a copy of the Judgment of Foreclosure and Sale, a copy of the the Referee's Report of Sale, and notice of proceedings to obtain surplus monies; (2) granting summary judgment in favor of plaintiff as to the facts and issues described in plaintiff's Complaint, on the grounds that the answer contains no valid defense and that no triable issue of fact exists in this case; together with the costs of the motion; (3) substituting the name of Elaine Gargulo for "JOHN DOE # 1" through "JOHN DOE #100," that being the correct name of the occupant or tenant of the premises; and (4) directing that this action be referred to a Referee to compute the amount due plaintiff, including expenses of collection and amounts advanced to protect the premises and preserve the plaintiff's lien, and to examine and report whether the mortgaged premises can be sold in parcels is determined as follows;

**ORDERED** that the part of the plaintiff's motion for: (1) an Order pursuant to CPLR 3212 striking the answer and counterclaim and limiting the appearance of defendant, John Scotto, to a notice of appearance with waiver of service of all papers and of notices of all proceedings in said action except a copy of the Referee's Oath and Report of amount due, a copy of the Judgment of Foreclosure and Sale, a copy of the the Referee's Report of Sale, and notice of proceedings to obtain surplus monies; (2) granting summary judgment in favor of plaintiff as to the facts and issues described in plaintiff's Complaint, on the grounds that the answer contains no valid defense and that no triable issue of fact exists in this case; (3) substituting the name of Elaine Gargulo for "JOHN DOE # 1" through "JOHN DOE #100," that being the correct name of the occupant or tenant of the premises; and (4) directing that this action be referred to a Referee to compute the amount due plaintiff, including expenses of collection and amounts advanced to protect the premises and preserve the plaintiff's lien, and to examine and report whether the mortgaged premises can be sold in parcels is granted; and it is further

**ORDERED** that the part of the plaintiff's motion for the costs of this motion is denied without prejudice to renew upon submission of a Judgment of Foreclosure and Sale pursuant to paragraph 14 of the mortgage contract: and it is further

**ORDERED** that the plaintiff shall serve a copy of this Order with a Notice of Entry within sixty (60) days of the date this Order is signed by the Court pursuant to CPLR 2103 (b), (1), (2) or (3) and upon any defendant who has served a Notice of Appearance by first class mail and thereafter file the affidavit(s) with the Clerk of the Court: and it is further

**ORDERED** that a copy of this Order wherein the caption is being amended shall be served with Notice of Entry upon the Calendar Clerk of this IAS Part 47 and the Clerk of the Court. .

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The present action involves the foreclosure on a note and mortgage pertaining to and alleging that the defendant John Scotto ( hereinafter “ Scotto ”) defaulted in repaying a note and mortgage secured by a mortgage on real property located at 47 East Inlet Road, Southampton, New York

Issue was joined by the service of an answer by Scotto’s counsel on or about October 25, 2011 consisting of general denials upon information and belief with four affirmatives defenses and one affirmative defense also denominated as a first counterclaim. Plaintiff served a reply to the counterclaim consisting of general denials and seven affirmative defenses on or about November 18, 2011.

Plaintiff now moves for summary judgment ( see CPLR 3212 [a] ; *Myung Chun v North Am. Mortg. Co.*, 285 AD2d 42, 729 NYS 2d 716 [ 1<sup>st</sup> Dept 2001 ] ) to dismiss Scotto’s answer and for the issuance of an order of reference. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case ( see *Friends of Animals v Associated Fur Mfrs.*, 46 NY 2d 1065, 416 NYS 2d 790 [ 1979] ). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented ( see *Stillman v Twentieth Century-Fox Film Corporation*, 3 NY 2d 395, 165 NYS 2d 498 [ 1957 ] ). The movant has the burden of proving entitlement to summary judgment ( see *Winegrad v N.Y.U. Medical Center*, 64 NY 2d 851, 487 NYS 2d 316 [ 1985] ). Once the burden of proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form, and must “show facts sufficient to require a trial of any issue of fact” ( CPLR 3212 [ b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS 2d 595 [ 1980] ) The opposing party must assemble, lay bare and reveal his or her proof in order to establish that the matters set forth in his or her pleadings are real and capable of being established ( see *Castro v Liberty Bus. Corp.*, 79 AD 2d 1014, 435 NYS 2d 340 [ 2d Dept 1981] ).

In an action to foreclose a mortgage, “ a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default” ( *Republic Natl. Bank of N.Y. v O’Kane*, 308 AD 2d 482, 764 NYS 2d 635 [ 2d Dept 2003 ] ( citation omitted ); see also *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 915 NYS 2d 569 [ 2d Dept 2011] ).

Plaintiff submits the affidavit testimony of Tonya Daigneaut, a Vice President of plaintiff and the affirmation of plaintiff’s counsel along with copies of the pleadings and the relevant mortgage documents, such as the note and mortgage signed by Scotto on December 14, 2004, as well as documentary evidence of Scotto’s unchallenged default since March 1, 2010 and proof that to the date of this motion said default remains uncured ( see *Emigrant Mortg. Co., Inc. v Fisher*, 90 AD 3d 823, 935 NYS. 2d 313 [ 2d Dept 2011]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD 3d 1079, 915 NYS. 2d 591 [ 2d Dept 2010]; *Chiarelli v Kotsifos*, 5 AD 3d 345, 772 NYS. 2d 531 [ 2d Dept 2004 ]; *Republic Natl. Bank of N.Y., v O’Kane*, 308 AD 2d 482, *supra* ). It is well settled that on a motion for summary judgment in a foreclosure action, a plaintiff must establish its prima facie entitlement to judgment as against a defendant mortgagor by submitting copies of the signed mortgage and note ( see *JPMorgan Chase Bank, N.A. v Agnello*, 62 AD 3d 662, 878 NYS. 2d 397 [ 2d Dept 2009 ]; *Cochran Inv. Co., Inc. v Jackson*, 38 AD 3d 704, 834 NYS. 2d 198 [ 2d Dept 2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD 3d 545, 796 NYS. 2d 533 [ 2d Dept 2005]; *Marine Midland Bank, N.A. v Freedom Rd. Realty Assoc.*, 203 AD 2d 538, 611 NYS 2d 34 [ 2d Dept

1994]). With this established, the burden shifted to Scotto to lay bare his proof and demonstrate, by admissible evidence, the existence of a material issue of fact requiring a trial ( *see*. **Grogg v South Road Assoc., L.P.**, 74 AD 3d 1021, 907 NYS 2d 22 [ 2d Dept 2010 ]; **Washington Mut. Bank v O’Conner**, 63 AD 3d 832, 880 NYS 2d 696 [ 2d Dept 2009]; **Aames Funding Corp. v Houston**, 44 AD 3d 692, 843 NYS 2d 660 [ 2d Dept 2007 ]; *lv app den* 10 NY3d 704, 857 NYS 2d 37 [ 2008 ]; *reargument den.* 10 NY 3d 916, 862 NYS 2d 222 [ 2008]; **Charter One Bank v Houston**, 300 AD 2d 429, 751 NYS 2d 573 [ 2d Dept 2002 ]; *lv app dismissed* 99 NY 2d 651, 760 NYS 2d 104 [2003 ]).

“An affidavit from one who has no personal knowledge of the operative facts is without probative value and consequently is insufficient to defeat the motion” ( **Bronson v Algonquin Lodge Ass’n, Inc.** 295 AD 2d 681, 744 NYS 2d 220 [ 3<sup>rd</sup> Dept 2002] *citations omitted*); *see also* **Sturtevant v Home Town Bakery, Inc.** 192 AD 2d 904, 597 NYS 2d 176 [ 3<sup>rd</sup> Dept 1993]). It is also well settled as a matter of law that an attorney’s affirmation of conclusory assertions not based upon personal knowledge, but hearsay, is legally insufficient to raise a material issue of fact to defeat a summary judgment motion ( *see* **Winter v Black**, 95 AD 3d 1208, 943 NYS 2d 909 [ 2d Dept 2012]; **Currie v Wilhouski**, 93 AD 816, 941 NYS 2d 218 [ 2d Dept 2012]; **Iacone v Passanisi**, 89 AD 3d 991, 933 NYS 2d 373 [ 2d Dept 2011]; **Nicolia v Nicolia**, 81 AD 3d 1327, 924 NYS 2d 509 [ 2d Dept 2011]; **Groboski v Godfry**, 74 AD 3d 1524, 903 NYS 2d 203 [ 3d Dept 2010 ]; **2 N. St. Corp. v Getty Saugerties Corp.**, 68 AD3d 1392, 1395, 892 NYS2d 217 [3d Dept 2009]; **Lampkin v Chan**, 68 AD 3d 727, 891 NYS 2d 113 [ 2d Dept 2009]; **Palo v Principo**, 303 AD 2d 478, 756 NYS 2d 623 [2d Dept 2003]; **Zuckerman v City of New York**, 49 NY 2d 557, *supra* )

“The denials in defendant’s answer are insufficient to defeat the motion for summary judgment” ( **New York Higher Education Services v Ortiz**, 104 AD 2d 864, 685, 479 NYS 2d 910 [ 3<sup>rd</sup> Dept 1984] *citation omitted*). A defendant cannot shelter himself behind general or specific denials, or denials of knowledge or information sufficient to form a belief. He must show that his denial or his defense is not false and sham, but interposed in good faith and not for delay ( *see* **Dwan v Massarene**, 199 AD 872, 192 NYS 577 [ 1<sup>st</sup> Dept 1922] *rev on other grounds* ). Scotto’s denials of information sufficient to form a belief, are patently insufficient, as a matter of law, and summary judgment will be granted when “the Answer proffers nothing more than general denials” ( **Fairbanks Co. v Simplex Supply Co.**, 126 AD2d 882, 511 NYS2d 171 [3d Dept 1987]). Bare denials, such as those asserted by Scotto without more, are insufficient to defeat plaintiff’s motion for summary judgment (*see* **1130 Anderson Ave. Realty Corp. v Mina Equities Corp.**, 95 AD2d 169, 465 NYS2d 511 [1<sup>st</sup> Dept 1983]). “Where . . . the cause of action is based upon documentary evidence, the authenticity of which is not disputed, a general denial, without more, will not suffice to raise an issue of fact” ( **Gould v McBride**, 36 AD2d 706, 319 NYS2d 125 [1<sup>st</sup> Dept 1971]; *affd* 29 NY2d 768, 326 NYS2d 565 [1971]).

Scotto’s Second Affirmative Defense alleges that the plaintiff lacks standing to maintain the foreclosure action and thus requires an inquiry by this Court ( *see* **Bank of New York v Silverberg**, 86 AD 3d 274, 926 NYS 2d 532 [ 2d Dept 2011]). *The plaintiff established its standing by the affidavit of its Vice President Tonya Daigneault and its proof of the physical delivery of the note as the successor-in-interest by merger with Commerce Bank ( see Matter of Jae-Bum Chang , 85 AD 3d 74, 923 NYS 2d 587 [ 2d Dept 2011]; TD Bank N.A. v Certified Land Abstract, 2010 N.Y. Misc. LEXIS 2362; 2010 NY Slip Op 31423U [ Sup Ct Nassau County 2010] *Court decisions declaring that TD Bank is the successor in interest to Commerce Bank and of which this**

*Court takes judicial notice* ) prior to the commencement of this action ( *see U.S. Bank, Natl. Assoc. v Cange*, 96 AD 3d 825, 947 NYS 2d 522 [ 2d Dept 2012]; *Deutsche Bank v Natl. Trust Co. v Rivas*, 95 AD 3d 1061, 945 NYS 2d 928 [ 2d Dept 2012]; *U.S. Bank Natl. Assn. v Sharif*, 89 NYS 2d 923, 933 NYS 2d 293[ 2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v Pietrancio* , 33 Misc 3d 528, 928 NYS 2d 818 [ Sup Ct Suffolk County 2011]). The second affirmative defense alleging that the plaintiff does not have standing is without merit (*see, LaSalle Bank, N.A. v Pace*, 31 Misc3d 627, 919 NYS2d 794 [Sup Ct, Suffolk County 2011]; *Deutsche Bank Natl. Trust Co. v Garvin*. 29 Misc3d 1215A, 918 NYS2d 397 [Sup Ct, Queens County 2010]; *cf., U.S. Bank Natl. Assn. v Madero*. 80 AD3d 751, 915 NYS2d 612 [2d Dept 2011]). The plaintiff has demonstrated by proof in admissible form, that it is and was the owner of the note and mortgage prior to the commencement of this action and was fixed at the time of commencement of the action as alleged in the complaint. Here, the record reveals quite clearly that the plaintiff is the successor in interest to the original lender who issued the note to Scotto on December 14, 2004. Scotto does not deny having signed same. The note has been held continuously by plaintiff and its predecessor in interest. The Court finds the defense to be surplusage. Scotto's second affirmative defense is without merit as a matter of law. ( *see Vita v New York Waste Servs. LLC*, 34 AD 3d 559, 824 NYS 2d 177 [ 2d Dept 2006]).

With respect to Scotto's counterclaim, plaintiff has demonstrated its prima facies entitlement to judgment as a matter of law by establishing that there was no contractual provision or fiduciary relationship which would have obligated it or its predecessor -in-interest to furnish Scotto with the mortgage loan or to accept less than full payment due. The plaintiff demonstrated its prima facie entitlement to judgment as a matter of law by establishing that there is no contractual provision or fiduciary relationship which would have obligated it to furnish the defendant mortgagors with a loan forbearance or a modification (*see, FGH Realty Credit Corp. v VRD Realty Corp.*, 231 AD2d 489, 491, 647 NYS2d 229 [1996], *lv dismissed* 89 NY2d 981, 656 NYS2d 739 [1997]; *Euba v Euba*. 78 AD 3d 761, 911 NYS 2d 402 [ 2d Dept 2010]; *Golombek v Monahan*, 2 AD3d 1405, 768 NYS2d 879 [4th Dept 2003]; *see generally, O'Connell v Soszynski*, 46 AD3d 644, 847 NYS2d 605 [2d Dept 2007]). As the plaintiff has satisfied its prima facie showing, the burden shifted to Scotto. In opposition, Scotto failed to raise a triable issue of fact by demonstrating by documents or other evidentiary proof that the plaintiff had a duty or contractual obligation to extend a mortgage loan modification to him, or that it acted in bad faith ( *see O'Connell v Soszynski*, 46 AD 3d 644, *supra*, *Fine Ats Enterprises, N.V. v Levy*, 149 AD 2d 795, 539 NYS 2d 827 [ 3d Dept 1989]; *Aurora Bank FSB v CSP Realty Assoc., LLP*, 2011 NY Slip Op 32407 U, 2011 NY Misc LEXIS 4365 [ Sup Ct. Suffolk County . Mayer, J.]; *cf Wells Fargo Bank, N.A. v Meyers*, 30 Misc 3d 697, 913 NYS 2d 500 [ Sup Ct. Suffolk County 2010, Sweeney, J.})).

In opposition to the motion, Scotto has failed to submit any evidentiary proof in support of his pleaded defenses or his counterclaim (*see, Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, *supra*; *Citibank, N.A. v Souto Geffen Co.*, 231 AD2d 466, 647 NYS2d 467 [1<sup>st</sup> Dept 1996]; *see generally, Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]). Scotto's affirmative defenses are conclusionary and lack any specific factual allegations to support them ( *see Fotiou v Goodman*, 74 AD 3d 1140, 905 NYS 2d 626 [ 2d Dept 2010]; *Vittorio v U-Haul Co.*, 52 AD 3d 823, 861 NYS 2d 726 [ 2d Dept 2008]; *Velasquez v Gomez*. 44 AD 3d 649 , 843 NYS 2d 368 [ 2d Dept 2007]; *Restrepo v Rockland Corp.*, 38 AD 3d 742, 832 NYS 2d 272 [ 2d Dept 2007]) and they are not pursued in defendants' opposition papers. Therefore, inasmuch as Scotto has failed to demonstrate any triable issue of fact or merit as to any defense in this foreclosure action ( *see Flagstar*

*Bank v Bellafore*, 94 AD 3d 1044, 943 NYS 2d 551 [ 2d Dept 2012 ] plaintiff is entitled to summary judgment, granting a judgment directing the foreclosure and sale of the premises, and appointing a referee to ascertain and compute the amount due to it ( see *Washington Bank, F.A. v O.Conner*, 63 AD 3d 832, *supra*; *Daniel Perla, Assoc., LP. v 101 Kent Assoc., Inc.*, 40 AD 3d at 677, 836 NYS 2d 630 [ 2d Dept 2007 ]; *U.S. Bank Trust, N.A. Trustee v Butti*, 16 AD 3d 408, 792 NYS 2d 505 [ 2d Dept 2005]; *Republic Natl. Bank of NY v O’Kane*, 308 AD 2d 2d 482, *supra* ).

In any event, Scotto admits his default in payment and the attempted tender of less than the full amount due and owing to the plaintiff which the plaintiff rejected ( see *EMC Mortg. Corp v Stewart*, 2 AD 3d 772, 769 NYS 2d 408 [ 2d Dept 2003]; *First Federal Savings Bank v Midura*, 264 AD 2d 407, 694 121 [ 2d Dept 199]; see also *Charter One Bank, FSB v Leone*, 45 AD 3d 958, 845 NYS 2d 513 [ 2d Dept 2007]; *United Companies Lending Corp. v Hingos*, 283 AD 2d 764, [ 724 NYS 2d 134 [ 2d Dept 2001]). Furthermore, Scotto has not offered any arguments in support of the counterclaim. Significantly, Scotto simply ignores the plain language of Paragraph 3 of the note which states that “ Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal.” A defendant in a foreclosure action who seeks to avoid summary judgment where there have been unquestionable defaults, must meet a threshold of believability if it claims that there was an oral promise to forgo or delay foreclosure (*New York State Urban Dev. Corp. v Garvey*, 98 AD2d 767, 469 NYS2d 789 [2d Dept 1983]). The bare assertion that certain representative of the mortgagee made such a promise is not enough to create an issue of fact (*New York State Urban Dev. Corp. v Marcus Garvey Brownstone Houses, Inc.*, 98 AD2d 767, 469 NYS 2d 789 [ 2d Dept 1983 ]; cf., *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 451 NYS 2d 663 [ 1982]).

Thus under these circumstances, Scotto failed to come forward with any evidence showing the existence of a triable issue of fact with respect to any defense or counterclaim, therefore the plaintiff is entitled to summary judgment ( see *Rossrock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD 3d 920, 912 NYS 2d 71 [ 2d Dept 2010]; *Matter of Augustine v Bank United FSB*, 75 AD 3d 596, 905 NYS 2d 652 [ 2d Dept 2010]). Accordingly, plaintiff is awarded summary judgment striking Scotto’s answer and affirmative defenses and dismissing his counterclaim ( see *Fed. Home Loan Mtge. Corp.. v Karastathis*, 237 AD 2d 558, 655 NYS 2d 631 [ 2d Dept 1996]).

In dismissing the answer and affirmative defenses, the Court rejects the argument that the lack of discovery compromised Scotto’s ability to adequately oppose the complaint. “It is well settled that a claimed need for discovery without some evidentiary basis indicating that discovery may lead to relevant evidence is insufficient to avoid the award of summary judgment ” ( *Hariri v Amper*, 51 AD 3d 146, 152, 854 NYS 2d 126 [ 1<sup>st</sup> Dept 2009]; *citation omitted*; see also *Bank of America v Tatham*, 305 AD 2d 183, 757 NYS 2d 855 [ 2d Dept 2003]). Here, Scotto has not indicated any basis to conclude that relevant evidence to support his claims might be found through discovery. “[M]ere hope and speculation that additional discovery might uncover evidence sufficient to raise a triable issue of fact is not sufficient ” to warrant denial of a motion for summary judgment ( *Sasson v Setina Mfg. Co., Inc.*, 26 AD 3d 487, 488, 810 NYS 2d 500 [ 2d Dept 2006]). The granting of a summary judgment motion should not be postponed to allow for discovery where the proponent of the additional discovery has failed “to demonstrate that the discovery sought would produce relevant evidence” ( *Frith v Affordable Homes of Am.*, 252 AD 2d 536, 537, 676 NYS 513 [ 2d Dept 1998 ]; “and cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that the discovery may lead to

relevant evidence” ( *Bailey v New York City Tr. Auth.*, 270 AD 2d 156, 704 NYS 2d 582 [ 2d Dept 2000]; *see also Freiman v JM Motor Holdings NR 125-139, LLC*, 82 AD 3d 1154, 920 NYS 2d 189 [ 2d Dept 2011]; *Dempaire v City of New York*, 61 AD 3d 816, 817, 877 NYS 2d 224 [ 2d Dept 2009]; *Conte v Frelen Assoc., LLC*, 51 AD 3d 620, 858 NYS 2d 258 [ 2d Dept 2008]; *Lopez v WS Distrib., Inc.*, 34 AD 3d 759, 825 NYS 2d 516 [ 2d Dept 2006]). Furthermore, the defendant did not move to compel discovery or show that it had an inadequate opportunity to conduct discovery before submitting opposition papers to the plaintiff’s instant motion for summary judgment ( *see Titian Communications , Inc., formerly known as Obio Telecom. Inc. v Diamond Phone Card, Inc.*, 94 AD 3d 740, 941 NYS 2d 280 [ 2d Dept 2012 ]).

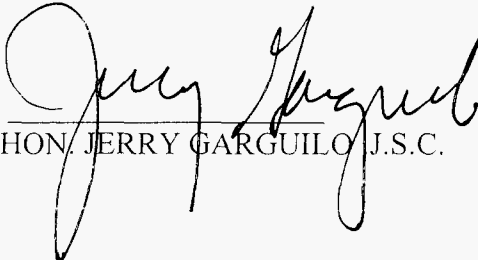
Additionally, in raising the issue of further discovery as affirmative relief, Scotto failed to serve a notice of cross motion pursuant to CPLR 2215 (*see Chun v North Am. Mtg. Co.*, 285 AD2d 42, 729 NYS2d 716 [1<sup>st</sup> Dept 2001]; *Hergerton v Hergerton*, 235 AD2d 395, 652 NYS2d 77 [2d Dept 1997]; *Thomas v The Drifters, Inc.*, 219 AD2d 463, 631 NYS2d 419 [2d Dept 1995]). An outright notice is required to prevent surprise to the original moving party (*see Guggenheim v Guggenheim*, 109 AD2d 1012, 468 NYS2d 489 [4<sup>th</sup> Dept 1985]).

The branch of the motion wherein the plaintiff seeks an order amending the caption as noted in the above Ordered paragraph is granted pursuant to CPLR 1024. Plaintiff’s submissions have formed the basis for relief ( *see Neighborhood Hous. Serv. N.Y. City, Inc. v Meltzer*, 67 AD 3d 872, 889 NYS 2d 627 [ 2d Dept 2009]). All future proceedings shall be captioned accordingly.

Plaintiff shall submit with the proposed Judgment of Foreclosure and Sale the required affidavit of non-military service pursuant to 50 USC 521 et seq,

Accordingly, the motion for summary judgment and to appoint a referee to compute and other affirmative relief as requested herein is granted. All matters not herein addresses are deemed denied. The proposed Order of Reference is executed simultaneously hereto. This constitutes the Order and decision of this Court.

Dated: July 16, 2013  
Riverhead, NY

  
HON. JERRY GARGUILO J.S.C.