

<b>Deutsche Bank Natl. Trust Co. v Rodriguez</b>
2013 NY Slip Op 31866(U)
July 2, 2013
Sup Ct, Suffolk County
Docket Number: 42341-09
Judge: Hector D. LaSalle
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 48 - SUFFOLK COUNTYPRESENT: Hon. HECTOR D. LASALLE  
Justice of the Supreme Court

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DEUTSCHE BANK NATIONAL TRUST  
COMPANY AS TRUSTEE FOR MORGAN  
STANLEY ABS CAPITAL I INC TRUST  
2006-NC4  
3476 Stateview Boulevard  
Ft. Mill, SC 29715

Plaintiff,

-against-

MARIA E. RODRIGUEZ, LUIS A. RODRIGUEZ,  
ARNOLD SHERMAN, ARROW FINANCIAL  
SERVICES LLC APO GE MONEY BANK,  
ASSET ACCEPTANCE LLC AS ASSIGNEE OF  
BALLYS TOTAL FITNESS, BROOKHAVEN  
MEMORIAL HOSPITAL, CAMERON COUNTY  
DSS, CAPITAL ONE BANK, CAPITAL ONE  
FSB, CHASE MANHATTAN BANK USA NA,  
CITIBANK (SOUTH DAKOTA) NA, CITIBANK  
USA N ASSIGNEE OF ASSET ACCEPTANCE  
LLC, CLERK OF THE SUFFOLK COUNTY  
DISTRICT COURT, COMMISSIONER OF  
MOTOR VEHICLES, DANIEL AHERN, DISCOVER  
BANK, DSNB MACYS, EAST ISLAND CHECK  
CASHING CORP., ERIN CAPITAL MANAGEMENT  
LLC, FORD MOTOR CREDIT COMPANY, GOOD  
SAMARITAN HOSPITAL MEDICAL CENTER,  
HEATHERWOOD HOUSE AT LAKELAND LLC,  
HOUSEHOLD FINANCE CORP. III, HOUSEHOLD  
FINANCE REALTY CORPORATION OF NEW YORK,  
HUNTINGTON HOSPITAL, JOHN T. MATHER  
MEMORIAL HOSPITAL, JOHN T. MATHER  
MEMORIAL HOSPITAL OF PORT JEFFERSON  
INC., JORGE VALERO, LR CREDIT II LLC,Motion Date: 11-13-12  
Adj. Date: \_\_\_\_\_  
Mot. Seq. #001 MGGROSS POLOWY ORLANS, LLC  
Attorney for Plaintiff  
25 Northpointe Parkway, Suite 25  
Amherst, NY 14228TRUJILLO LAW PLLC  
Attorneys for Defendants  
Maria E. Rodriguez  
Luis A. Rodriguez  
151 Herrick Road  
Garden City Park, N. Y. 10040

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LVNV FUNDING LLC, MANDEE SHOPS A DIV  
OF BIG M INC., MICHAEL SOOJIAN MD,  
MIDLAND CREDIT MANAGEMENT INC.,  
MIDLAND FUNDING LLC, MIDLAND FUNDING  
LLC DBA IN NEW YORK AS MIDLAND FUNDING  
OF DELAWARE LLC, MIDLAND FUNDING NCC 2 CORP.  
MKM ACQUISITIONS LLC ASSIGNEE OF FLEET  
BANK, MONTEFIORE MEDICAL CTR, MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS, INC.  
AS NOMINEE FOR GREENPOINT MORTGAGE  
FUNDING, INC., NCO PORTFOLIO MANAGEMENT,  
NEW CENTURY FINANCIAL SERVICES INC., NEW  
YORK MERCHANTS PROTECTIVE CO. INC., NEW  
YORK STATE DEPARTMENT OF TAXATION AND  
FINANCE, NORTH SHORE UNIVERSITY HOSP.  
CLINICAL PRACTICE PLAN, NY FINANCIAL  
SERVICES LLC, PALISADES COLLECTION LLC,  
PALISADES COLLECTION LLC AAO AT&T  
WIRELESS, PALISADES COLLECTION LLC AO  
FINGERHUT, PEOPLE OF THE STATE OF NEW  
YORK PORT RECOVERY SERVICES INC. AS  
ASSIGNEE OF HOUSEHOLD FINANCE CORPORATION,  
PORTFOLIO RECOVERY ASSOCIATES LLC, RAB  
PERFORMANCE RECOVERIES LLC, SANDRA  
SOTO, SHEILA L. STEVENS, SOUTH BAY  
ANESTHESIA ASSOC., SOUTHSIDE HOSPITAL,  
SOVEREIGN BANK, STATE OF NEW YORK ON  
BEHALF OF UNIVERSITY HOSPITAL O P A/K/A  
STATE OF NEW YORK ON BEHALF O UNIVERSITY  
HOSPITAL I/P, SUFFOLK COUNTY DEPT. OF  
SOCIAL SERVICES, TARGET NATIONAL BANK  
AAO ASSET ACCEPTANCE LLC, THE BIG M  
INC. DBA MANDEE, TOWN OF ISLIP, TOWN  
SUPERVISOR TOWN OF BROOKHAVEN, TOWN  
SUPERVISOR TOWN OF ISLIP, UNIFUND CCR  
PARTNERS AS ASSIGNEE OF PROVIDIAN  
NATIONAL BANK, UNITED STATES OF  
AMERICA ACTING THROUGH THE IRS, US  
EXPRESS LEASING, WEST ISLIP ORTHOPEDIC  
LLP,

JOHN DOE (Said names being fictitious it  
being the intention of Plaintiff to designate any and  
all occupants of premises being foreclosed herein,  
and any parties, corporations or entities, if any,  
having or claiming an interest or lien upon the  
mortgaged premises.)

**Defendants.**

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Upon the following papers numbered 1 to \_\_\_\_\_ read on this motion for summary judgment and an order of reference; Notice of Motion/ Order to Show Cause and supporting papers \_\_\_\_\_; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this unopposed motion by the plaintiff seeking an Order (1) for summary judgment dismissing the answer of the defendants; Luis A. Rodriguez and Maria E. Rodriguez, by their attorney Luis R. Trujillo, Jr. Esq., pursuant to CPLR 3211 and CPLR 3212 and for permission to treat said answer as a limited Notice of Appearance, entitling said defendant's attorney, Luis Trujillo, Jr., to receive without prior notice, a copy of the Notice of Sale, Notice of Discontinuance and surplus money Proceedings, if any; (2) appointing Referee to determine the amount due and to ascertain whether the premises may be sold in parcels; (3) that the caption be amended by substituting Caudia Gutierrez, Danny Catigas and Jose Ardon as party defendants in place of "JOHN DOE", all without prejudice to the proceeding heretofore had herein; (4) that all non-appearing and non-answering defendants be deemed to be in default, and that said defaults be fixed and determined; (6) that the address of the plaintiff be deleted from the from the caption; (5) that the caption be amended to reflect the deletion of the named defendants, Michael Soojian, M.D., Sheila L. Stevens and Town of Brookhaven Supervisor, Town of Brookhaven as party defendants: and (6) for such other and further relief as the Court may deem just and proper is granted; and it is further

**ORDERED** that the movant shall serve a copy of this Order with Notice of Entry within sixty (60) days after the date it signed by the Court upon counsel pursuant to CPLR 2103 (b), (1), (2), or (3) for the defendants and thereafter file the affidavit(s) of service with the Clerk of the Court; and it is further

**ORDERED** that the movant's Second Cause of Action which seeks A Declaratory Judgment extinguishing a prior lien against the mortgaged premises by Mortgage Electronic Registration Systems, Inc., as Nominee for Greenpoint Mortgage Funding, Inc., is severed and dismissed without prejudice; and it is further

**ORDERED** that the movant shall also serve a copy of this Order with Notice of Entry upon the Calendar Clerk of this IAS Part 48 and the Clerk of the Court, by first class mail with a Certificate of Mailing, who shall both note in the courts computerized records the amendment of the caption as set forth in the first Ordered paragraph of this Order. All future submissions under this Index number shall reflect the amended caption.

The present action involves the foreclosure on a note and mortgage pertaining to and alleging that the defendants, Maria E. Rodriguez and Luis R. Rodriguez (hereinafter collectively "Rodriguez"), defaulted in repaying a note and mortgage secured by real property located at 3 Hewes Street, Brentwood, NY 11717.

Issue was joined by the service of an answer by counsel for the defendants consisting of general denials and three affirmative defenses on or about November 19, 2009.

Plaintiff now moves for summary judgment (*see* CPLR 3212 [a] ; **Myung Chun v North Am. Mtg. Co.**, 285 AD2d 42, 729 NYS2d 716 [1<sup>st</sup> Dept 2001]) to dismiss the answer set forth by Rodriguez and for the issuance of an order of reference. “[I]n 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 AD2d 482, 764 NYS2d 635 [2d Dept 2003] (*citation omitted*); *see also* **Wells Fargo Bank, N.A. v Cohen**, 80 AD3d 753, 915 NYS2d 569 [2d Dept 2011]).

Plaintiff submits the affidavit testimony of Edith J. Almazan an officer of plaintiff’s servicer 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 Rodriguez on March 31, 2006 in addition to documentary evidence of Rodriguez’s default since June August 1, 2008 and that to the date of this motion said default remains uncured (*see* **Emigrant Mtg. Co., Inc. v Fisher**, 90 AD3d 823, 935 NYS2d 313 [2d Dept 2011]; **Argent Mtge. Co., LLC v Montesana**, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; **Chiarelli v Kotsifos**, 5 AD3d 345, 772 NYS2d 531 [2d Dept 2004]; **Republic Natl. Bank of N.Y. v O’Kane**, 308 AD2d 482, *supra*); CPLR 3212; RPAPL §1321. It is well settled that on a motion for summary judgment in foreclosure, a plaintiff establishes its prima facie entitlement to judgment as against a defendant mortgagor by submitting copies of the subject signed mortgage and note (*see* **Bank of New York v Alderazi**, 99 AD3d 837, 951 NYS2d 900 [2d Dept 2012]; **JPMorgan Chase Bank v Agnello**, 62 AD3d 878 NYS2d 397 [2d Dept 2009]; **Cochran Inv. Co., Inc. v Jackson**, 38 AD3d 704, 834 NYS2d 198 [2d Dept 2007]; **Household Fin. Realty Corp. of New York v Winn**, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]; **Marine Midland Bank, N.A. v Freedom Rd. Realty Assoc.**, 203 AD2d 538, 611 NYS2d 34 [2d Dept 1994]). With this established, the burden shifted to Rodriguez to lay bare their 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 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; **Washington Mut. Bank v O’Connor**, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]; **Ames Funding Corp. v Houston**, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]; *lv app den* 10 NY3d 704, 857 NYS2d 37 [2008]; *reargument den.* 10 NY3d 916, 862 NYS2d 222 [2008]; **Charter One Bank v Houston**, 300 AD2d 429, 751 NYS2d 573 [2d Dept 2002]; *lv app dismissed* 99 NY2d 651, 760 NYS2d 104 [2003]).

The motion which was served upon Rodriguez is unopposed and considered by the Court to be on default (*see* **Rokina Optical Co. v Camera King Inc.**, 63 NY2d 728, 480 NYS2d 197 [1984]; **Acupuncture Works, P.C. as Assignee of Jacqueline Roman Garcia, v Interboro Ins. Co.** 34 Misc 134A, 946 NYS2d 65 [Supreme Court of New York, Appellate Term, Second Department 2011]). The lack of opposition is tantamount to consent (*see* **Hermitage Ins. Co. v Trance Nite Club, Inc.**, 40 AD3d 1032, 834 NYS2d 870 [2d Dept 2007]; CPLR 3215; **Zino v Jaob Taxi, Inc.**, 20 AD3d 521, 799 NYS2d 124 [2d Dept 2005]; **Woodson v Mendon Leasing Corp.**, 100 NY2d 62, 760 NYS2d 727 [2003]; *see also* **Neuman v Zurich N. Am.**, 36 AD3d 601, 828 NYS2d 169 [2d Dept 2007]). Additionally, “uncontradicted facts are deemed admitted” (**Tortorello v Carlin**, 260 AD2d 201, 688 NYS2d 64 [1<sup>st</sup> Dept 1999]).

Therefore, plaintiff's motion is granted and Schade's answer is dismissed (*see Rokina Optical Co. v Camera King Inc.*, 63 NY2d 728, *supra*).

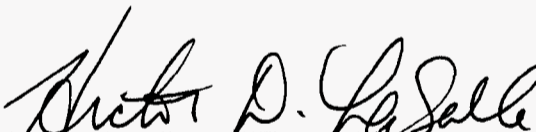
Here, the moving papers established the plaintiff's possession of cognizable claims for a judgment of foreclosure and sale against the mortgagor defendants. However, the moving papers failed to address, let alone establish, the plaintiff's possession of cognizable claims for declaratory relief pursuant to RPAPL Article §15 (*see* CPLR 3215[f]; RPAPL §§1515; 1519). Nor is it apparent that the plaintiff acquired jurisdiction over all persons whose interests might be affected by the granting of such relief (*see* RPAPL §1511).

In addition, the court finds that the plaintiff abandoned its second cause of action for declaratory relief by its interposition of this motion. It is axiomatic that the appointment of a referee to compute pursuant to RPAPL §1321 is not appropriate unless all pleaded claims of the parties have been adjudicated by the court and the only issues left for determination are those concerning the long account (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]). In mortgage foreclosure actions, the issues of the long account are limited to the amounts due the plaintiff by reason of the obligor's default under the terms of the note, mortgage and/or guaranty sued upon and the other matters specified in RPAPL §1321 (*see New York State Mtg. Loan Enforcement and Admin. Corp. v New Colony Camp Houses, Inc.*, 187 AD2d 955, 590 NYS2d 635 [4th Dept 1992]). By moving for the appointment of a referee without establishing its entitlement to a default judgment on its claims for declaratory relief, the plaintiff effectively abandoned those claims. Further the continuation of the second cause of action in this action is contrary to the narrow purposes and specific confines of an order of reference under RPAPL §1321. Therefore, in the exercise of the type of discretion that the Court otherwise possess under CPLR 603 (*see eg Naylor v Knoll Farms of Suffolk County Inc.*, 31 AD3d 726, 818 NYS2d 460 [2d Dept 2006]), the second cause of action is severed and dismissed without prejudice.

Accordingly, the unopposed motion for summary judgment and for the appointment of a referee to compute is granted. The Order of Reference is being contemporaneously signed with this SFO.

This constitutes the Order and decision of the Court.

Dated: July 2, 2013  
 Riverhead, NY

  
 HON. HECTOR D. LASALLE, J.S.C.

\_\_\_ FINAL DISPOSITION       X  NON-FINAL DISPOSITION