

Goldfinger v Florea
2015 NY Slip Op 31191(U)
March 26, 2015
Supreme Court, Suffolk County
Docket Number: 5819-2013
Judge: C. Randall Hinrichs
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SUPREME COURT - STATE OF NEW YORK
IAS PART 49 - SUFFOLK COUNTY

PRESENT: Hon. C. RANDALL HINRICHS
 Justice of the Supreme Court

 DAVID GOLDFINGER AS TO 20%, STANLEY
 MARGULIES ROLLOVER IRA, SUNWEST
 TRUST INC. AS CUSTODIAN, AS TO 6.60%,
 LARRY GILDERMAN IRA AS TO 20%,
 DAVID & CORINNE ZINADER AS TO 9.28%,
 ARTHUR FEINBERG ROLLOVER IRA,
 EVERCORE TRUST CO. AS CUSTODIAN, AS
 TO 13.40%, TEMKIN FAMILY TRUST,
 CHARLES TEMKIN TRUSTEE,
 AS TO 13.40%, ROBERT TEMKIN IRA AS TO
 10.72% and JUDITH BAKER AS TO 6.60%,

Plaintiff,

-against-

MARIANA FLOREA, ALEXE FLOREA and

JOHN DOE 1-5 and JANE DOE 1-5, the last ten
 names being fictitious and unknown to plaintiff,
 the person or persons intended being the tenants,
 occupants, persons or corporations, if any, having
 or claiming an interest in or lien upon the premises
 described in the complaint,

Defendants.

MOTION DATE: 2-13-14
 Mot. Seq. # 001-MG

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Upon the following papers numbered 1 to 28 read on this motion for summary and default judgment and to appoint a referee; Notice of Motion/Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers 8 - 12; Answering Affidavits and supporting papers 8 - 12; Replying Affidavits and supporting papers 13 - 16; Other Sur-reply 17 - 21; Response to Sur-reply 22 - 25; Letters 26 - 28; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiffs David Goldfinger as to 20%, Stanley Margulies F ollover IRA, Sunwest Trust Inc. as custodian, as to 6.60%, Larry Gilderman IRA as to 20%, David & Corrine Zinader as to 9.28%, Arthur Feinberg Rollover IRA, Evercore Trust co. as custodian, as to 13.4%, Temkin l amily Trust, Charles Temkin Trustee, as to 13.40%, Robert Timkin IRA as to 10.72% and Judith Baker as to 6.60% for an order awarding them summary judgment against defendants Mariana Florea and Alexe Flore: and default judgments against the remaining defendants joined by service of process, identifying and/or deleting unknown defendants, amending the caption, and for an order appointing a referee to compute, is considered under CPLR 3212, 3215, 1003 and RPAPL §1321, is granted as set forth below; and it is

ORDERED that plaintiffs are directed to serve a copy of this order amending the caption upon the Calendar Clerk of this Court; and it is further

ORDERED that within 30 days of the entry date of this order, plaintiffs shall serve a copy of the order of reference with notice of entry upon all parties who have appeared in this action and thereafter file the affidavit of service with the Clerk of the Court.

In this mortgage foreclosure action, plaintiffs David Goldfinger as to 20%, Stanley Margulies Rollover IRA, Sunwest Trust Inc. as custodian, as to 6.60%, Larry Gilderman IRA as to 20%, David & Corinne Zinader as to 9.28%, Arthur Feinberg Rollover IRA, Evercore Trust co. as custodian, as to 13.4%, Temkin Family Trust, Charles Temkin Trustee, as to 13.40%, Robert Timkin IRA as to 10.72% and Judith Baker as to 6.60% ("plaintiffs") move under CPLR 3215, 3212 and RPAPL §1321 for an order awarding them summary judgment against defendants Mariana Florea and Alexe Florea ("defendants"); fixing the defaults in answering of the non-answering defendants; substituting one or more occupants found at the premises for unknown defendants named in the caption and/or otherwise deleting as party defendants certain named defendants; and appointing a referee to compute amounts due under the subject mortgage.

Plaintiffs established their entitlement to summary judgment on the complaint against defendants by submitting copies of the mortgage, the unpaid note and evidence of a default under the terms thereof (CPLR 3212; RPAPL § 1321; *see Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753 [2d Dept 2011]).

Plaintiff's submissions further demonstrate that the affirmative defenses and counterclaims in defendant's answer are without merit (*see, Becher v Feller*, 64 AD3d 672 [2d Dept 2009]; *Coppa v Fabozzi*, 5 AD3d 718 [2d Dept 2004]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]; *Morales v AMS Mtge. Svcs., Inc.*, 69 AD3d 691 [2d Dept 2010]; *Bank of America, N.A. v Lucido*, 114 AD3d 714 [2d Dept 2014]; *Washington Mut. Bank v Schenk*, 112 AD3d 615 [2d Dept 2013]; *FGH Realty Credit Corp. v VRD Realty Corp.*, 201 AD2d 489 [2d Dept 1996]; *Connecticut Natl. Bank v Peach Lake Plaza*, 204 AD2d 909 [3d Dept 1994]). When a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, requiring that the balance be tendered or commence foreclosure proceedings, and equity will not intervene (*see Home Sav. of Am., FSB v Isaacson*, 240 AD2d 633, 633 [2d Dept 1997]).

In opposition, defendants are required to submit proof sufficient to raise a genuine question of fact rebutting plaintiff's prima facie showing, or in support of the affirmative defenses and counterclaims asserted in their answer (*see, Washington Mut. Bank, F.A. v O'Connor*, 63 AD3d 832 [2d Dept 2009]). Even when considered in the light most favorable to defendants, their opposing papers are insufficient to raise any genuine question of fact requiring a trial on the merits of plaintiffs' claims (*see, Bank of Smithtown v 21 Sag Main, LLC*, 107 AD3d 654 [2d Dept 2013]). The opposition is also insufficient to demonstrate any bona fide defenses or the merits of any of the asserted counterclaims (CPLR 3211[e]; *see PHH Mtge. Corp. v Israel*, 120 AD3d 1329 [2d Dept 2014]).

Plaintiff's application for an order excising as party defendants the unknown defendant listed in the caption and amending the caption to reflect the same is granted (*see, PHH Mtge. Corp. v Davis*, 111 AD3d 1110 [3d Dept 2013]).


Plaintiffs established that a settlement conference, as mandated by CPLR 3408, was conducted before the court's mortgage foreclosure conference part on July 12, 2013, at which time the action was dismissed from

the conference program and referred as an IAS case because the parties were unable to modify the loan or otherwise reach a settlement. Accordingly, there has been compliance with CPLR 3408, and no further conference is required.

As plaintiffs have been awarded summary judgment against defendants, and there are no other defendants joined in this action, plaintiffs' application for an order appointing a referee to compute amounts due under the note and mortgage is granted (RPAPL § 1321; see, *Green Tree Servicing, LLC v Cary*, 106 AD3d 91 [2d Dept 2013]).

The proposed order appointing a referee to compute, as modified by the court, has been signed concurrently herewith.

Dated: March 26, 2015



Hon. C. RANDALL HINRICHS, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION