

**Manufacturers & Traders Trust Co. v Colwell**

2016 NY Slip Op 30119(U)

January 21, 2016

Supreme Court, Tioga County

Docket Number: 45562

Judge: Eugene D. Faughnan

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This opinion is uncorrected and not selected for official publication.

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 20<sup>th</sup> day of November, 2015.

PRESENT: HON. EUGENE D. FAUGHNAN  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF TIOGA

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MANUFACTURERS AND TRADERS TRUST  
COMPANY

Plaintiff,

DECISION AND ORDER

Index No. 45562  
RJl No. 2015-0166-M

vs.

LORETTA COLWELL a/ka/ LORETTA J. GLENN;  
KENDON WOOD a/k/a KENTON WOOD;  
KRYSTI WOOD a/k/a KRYSTI KASMARCIK,  
individually, and d/b/a KOLYN'S FROZEN TREATS;  
COMMISSIONER OF TAXATION AND FINANCE;  
JOHN DOE and JANE DOE, the two defendants last  
named being possible tenants in possession of portions  
of premises under foreclosure, the names being  
fictitious, their true names being unknown to the plaintiff

Defendants.

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APPEARANCES:

COUNSEL FOR PLAINTIFF:

COSTELLO, COONEY & FEARON PLLC  
By: Anthony J. Hanley, Esq.  
5701 West Genesee Street  
Camillus, NY 13031

COUNSEL FOR DEFENDANT,  
LORETTA COLWELL:

ALFRED PANICCIA, JR.  
53 Chenango Street, Suite 400  
Binghamton, NY 13901

**EUGENE D. FAUGHNAN, J.S.C.**

Manufacturers and Traders Trust Company ("Plaintiff") filed a motion for summary judgment and for the appointment of a Referee in connection with this foreclosure action.

Defendant Loretta Glenn has opposed the application.

The Court has received and reviewed Plaintiff's moving papers: Affidavit of Brian Ferger dated June 9, 2015; Affirmation of Anthony Hanley, Esq. dated June 15, 2015 with exhibits; and Affirmation of Anthony Hanley dated June 15, 2015 concerning foreclosure settlement conference. The Court has also received and reviewed Defendant Glenn's Affidavit in Opposition dated November 13, 2015, as well as Plaintiff's supplemental affidavit from Sandy Korbit dated November 18, 2015, with exhibits. The Court also heard oral argument on the motion.

Plaintiff and Defendant Glenn entered into a loan agreement dated July 31, 2008 for the mortgage of property located in Candor, New York, which is in Tioga County. The contract provides a credit limit of \$60,000 and the payment option is identified as "Interest Only Period", and the draw expiration date is listed as July 31, 2018. The Draw and Repayment Periods are described in Section 3, which states:

The Account will consist of two periods, a Draw Period and a Repayment Period. You are permitted to make new loans from time to time, only during the Draw Period. The Draw Period will end at the close of the Billing Cycle that the Account is in on the Draw Period Expiration Date on page one. The Repayment Period, which begins with the first Billing Cycle following the end of the Draw Period, will continue until you have paid the Total Balance in Full. The Repayment Period will be approximately 15 years long.

Defendant's position is that she was required to make only interest payments for the first 10 years (since the draw expiration is July 31, 2018), and then the Repayment Period would be applicable. However, Section 14 of the agreement provides some additional definitions and limitations, stating that:

14. Calculation of the minimum payment. For each Billing Cycle, the Total Payment Due will be the total of any Past Due Amount, any Over Credit Limit Amount, and the Amount Billed this Statement.

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**(B) Interest Only Payment Option.** If you have chosen the Interest Only Payment Option on page one, the Minimum Monthly Payment for the Base Account... will be

**(1) During the first five years of the Draw Period.**

During Billing Cycles the last day of which are before a date five (5) years prior to the Draw Period Expiration Date, the sum of the Finance Charges due to the application of the Periodic Rate... Other Finance Charges, and Other Charges accrued during the Billing Cycle for that part.

**(2) During the last five years of the Draw Period.**

During Billing Cycles the last day of which are on or after a date five (5) years prior to the Draw Period Expiration Date, the sum of the Finance Charges due to the application of the Periodic Rate... Other Finance Charges, and Other Charges accrued during the Billing Cycle for that part, plus the lesser of **(1) the Loan Balance in that part at the end of the Billing Cycle; or (2) the Loan Balance in that part at the end of the last day on which a loan was posted to that part divided by 180.** (Emphasis Added)

Thus, it appears that the contract provides for a Draw Period of 10 years, the first 5 of which will involve interest only payments, and the last 5 years will include principal payments. During years 5-10, the borrower can still obtain loans, but has to start paying back some principal. After year 10, the loan is in Repayment Period, and no Draws, or loans, are permitted.

Defendant does not claim to have made ongoing payments of interest and principal.

Rather, she contends that she was only required to make interest payments. However, as noted above, in years 5-10, the payment obligation changed per the agreement. Although Defendant attempted to make some continuing payments at the end of 2013 and 2014, she admittedly was only making interest payments by the first half of 2014. Once Defendant failed to meet the repayment terms, Plaintiff could properly declare the loan in default and accelerate payments, under the terms of the agreement.

When seeking summary judgment, the movant must make a *prima facie* case showing its entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. *Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3<sup>rd</sup> Dept. 1987); *Bulger v. Tri-Town Agency*, 148 AD2d 44 (3<sup>rd</sup> Dept. 1989). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3<sup>rd</sup> Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2<sup>nd</sup> Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985).

Plaintiff has made a *prima facie* case by submitting the mortgage and the unpaid note, and evidence of the default. *See, JP Morgan Chase Bank, N.A. v. Hill*, 133 AD3d 1057 (3<sup>rd</sup> Dept. 2015). The burden was then shifted to the Defendant. The Court finds that the Defendant has failed to raise a triable issue of fact, and therefore, Plaintiff is entitled to summary judgment, and the granting of an Order of Reference.

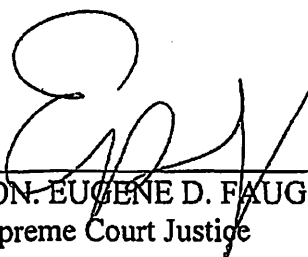
Accordingly, it is hereby:

**ORDERED**, that Plaintiff is granted summary judgment, and it is further

**ORDERED**, that Plaintiff is to submit a revised Proposed Order to the Court, on notice to Defendant Glenn through her attorney, within 15 days.

**This constitutes the Decision and Order of this Court.**

Dated: January 21, 2016  
Owego, New York



HON. EUGENE D. FAUGHNAN  
Supreme Court Justice