

MAP-FC 6/21/18 @ 2:00 P.M.

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF WESTCHESTER**

-----X
RIDGEWOOD SAVINGS BANK,

Plaintiff,

-against -

PHILIP ORLANDO, JILL ORLANDO a/k/a
J. ORLANDO, NEW YORK STATE TAX
COMMISSION, U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK,
"JOHN DOE #1" through and including
"JOHN DOE #25" the defendants last
named in quotation marks being
intended to designate tenants or
occupants in possession of the herein
described premises or portions thereof,
if any there be, said names being
fictitious, their true names being
unknown to plaintiff,

Defendants.

-----X
LUBELL, J.

The following papers were considered in connection with this motion by plaintiff for an Order: (a) striking the answer with affirmative defenses and dismissing the counterclaims of defendants; (b) granting plaintiff summary judgment for the relief demanded in the complaint pursuant to CPLR 3212, upon the grounds that there are no triable issues of fact and that there is no merit to the defenses asserted in the defendants' answer; (c) discontinuing this action against the defendants sued herein as "John Doe #1" through and including "John Doe #25"; (d) holding all non-answering and non-appearing defendants in default pursuant to CPLR 3215; (e) appointing a referee to ascertain and compute the amount due to the plaintiff on the note and mortgage upon which this action is brought and to examine and report whether the mortgaged premises can be sold in one or more parcels and (f) awarding the costs of this motion to the plaintiff:

PAPERS
NOTICE OF MOTION/AFFIRMATION/AFFIDAVIT/
EXHIBITS A-O/PROPOSED ORDER

NYSCEF
21-41

AFFIDAVIT IN SUPPORT/ATTACHMENTS	43,44
AFFIRMATION IN OPPOSITION/EXHIBITS A-K	45-56
REPLY AFFIRMATION/EXHIBITS A-B	59-62

The plaintiff commenced this action to foreclose a mortgage. In answering the complaint, defendants Philip and Jill Orlando (hereinafter "the Orlando's") set forth several affirmative defenses including that, as a condition precedent and in order to maintain the action, the plaintiff, pursuant to RPAPL Section 1304, was required to send, at least ninety days prior to legal action against the borrower, a notice of default, and that the plaintiff has failed to properly do so. Plaintiff moved, inter alia, for summary judgment on the complaint and to appoint a referee to compute.

Based upon the record, including the affidavit of Jennifer Dobron, it is clear the plaintiff has failed to "tender[] sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304, and failure to make this showing requires denial of the motion, regardless of the opposing papers." (Aurora Loan Services, LLC v. Weisblum, 85 AD3d 95, 105 [2d Dept 2011] citing Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]).

"Generally, 'proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee' " (New York & Presbyt. Hosp. v. Allstate Ins. Co., 29 AD3d 547, 547 [2006], quoting Matter of Rodriguez v. Wing, 251 AD2d 335, 336 [1998]). "The presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (Residential Holding Corp. v. Scottsdale Ins. Co., 286 AD2d 679, 680 [2001]) . . . [A] certified mail receipt, standing alone, [is] insufficient to raise a triable issue of fact as to actual mailing (see New York & Presbyt. Hosp. v. Allstate Ins. Co., 29 AD3d at 548; Matter of State Farm Mut. Auto. Ins. Co. [Kankam], 3 AD3d 418, 419 [2004]; cf. Westchester Med. Ctr. v. Liberty Mut. Ins. Co., 40 AD3d 981, 983 [2007]).

(Mid City Const. Co., Inc. v. Sirius Am. Ins. Co., 70 AD3d 789, 790 [2d Dept 2010]).

While there is no dispute that Plaintiff sent the statutory notice by certified mail, there is no proof in Plaintiff's initial moving papers that the statutory notice was sent by first class

mail as well. Plaintiff makes a belated attempt to cure that deficiency in its reply papers, but the law is clear that the Court cannot consider evidence first raised in reply papers.

Plaintiff's failure to make a prima facie showing of strict compliance with RPAPL Section 1304 requires denial of its motion for summary judgment, regardless of the sufficiency of the opposing papers. [Aurora Loan Servs., LLC v. Weisblum, 85 AD3d 95, 106 (2d Dept. 2011); Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]].

Based upon the foregoing, it is hereby


ORDERED that plaintiff's motion for an Order (a) striking the answer with affirmative defenses and dismissing the counterclaims of defendants; (b) granting plaintiff summary judgment for the relief demanded in the complaint pursuant to CPLR 3212, upon the grounds that there are no triable issues of fact and that there is no merit to the defenses asserted in the defendants' answer; © holding all non-answering and non-appearing defendants in default pursuant to CPLR 3215; (d) appointing a referee to ascertain and compute the amount due to the plaintiff on the note and mortgage upon which this action is brought and to examine and report whether the mortgaged premises can be sold in one or more parcels and (e) awarding the costs of this motion to the plaintiff is DENIED, and, it is further

ORDERED that plaintiff's unopposed motion for an Order discontinuing this action against the defendants sued herein as "John Doe #1" through and including "John Doe #25" is GRANTED, and, it is further

ORDERED, that the parties are directed to appear on June 21, 2018 at 2:00 p.m. in the Mandatory Appearance Part - Foreclosure, Courtroom 800, Westchester County Supreme Court, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
May 23, 2018



HON. LEWIS J. LUBELL, J.S.C.

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