

**Wells Fargo Bank v Siddiqui Group of Companies,  
LLC**

2012 NY Slip Op 31376(U)

May 9, 2012

Sup Ct, Nassau County

Docket Number: 12806-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**WELLS FARGO BANK, NATIONAL ASSOCIATION  
AS TRUSTEE FOR WATERFALL VICTORIA  
GRANTOR TRUST, JEMCAP SERIES C,**

**TRIAL/IAS PART: 16  
NASSAU COUNTY**

**Plaintiff,**

**Index No: 12806-11**

**Motion Seq. No: 1**

**-against-**

**Submission Date: 3/22/12**

**SIDDIQUI GROUP OF COMPANIES, LLC,  
MOHAMMAD J. SIDDIQUI, NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE,**

**“JOHN DOE #1” through “JOHN DOE #20,” the last  
twenty names being fictitious and unknown to plaintiff,  
the persons or parties 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.**

-----X

**Papers Read on this Motion:**

- Notice of Motion, Proposed Order, Affirmation in Support,**
- Affirmation of Non-Military Service, Affidavit in Support and Exhibits...x**
- Affirmation in Opposition, Affidavit in Opposition and Exhibits.....x**
- Reply Affirmation and Exhibit.....X**

This matter is before the court on the motion filed by Plaintiff Wells Fargo Bank, National Association as Trustee for Waterfall Victoria Grantor Trust, Jemcap Series C (“Plaintiff”) on February 22, 2012 and submitted on March 22, 2012. For the reasons set forth below, the Court grants the motion.

## BACKGROUND

### A. Relief Sought

Plaintiff moves for an Order 1) striking the verified answer with affirmative defenses of Defendants Siddiqui Group of Companies, LLC and Mohammad J. Siddiqui (“Defendants”); B) granting summary judgment for the relief demanded in the Verified Complaint pursuant to CPLR § 3212; 3) amending the caption to substitute R.R.T. Food Corp for “John Doe #1” as a party defendant in the caption of this action; 4) discontinuing the action against the Defendants sued herein as “John Doe 2” through “John Doe 20;” 5) 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 6) awarding the costs of this motion to the Plaintiff.

Defendants oppose the motion.

### B. The Parties’ History

The Verified Complaint (“Complaint”) (Ex. A to Labeck Aff. in Supp.) alleges as follows:

At all relevant times, Plaintiff was, and still is, a National Banking Association having its principal place of business in South Dakota, and authorized to do business in New York. On October 11, 2005, Defendant Siddiqui Group of Companies, LLC (“LLC”) duly executed and delivered to Greenpoint Mortgage Funding Inc. (“Greenpoint”) its note (“Note”) bearing the same date, pursuant to which the LLC promised to repay to Greenpoint, its successors or assigns, the principal sum of \$300,000.00 with interest at the initial rate of 8.250% per centum per % annum, as set forth in the Note. The Note contained a clause that the mortgage (“Mortgage”) dated the same day as the Note protects the holder of the Note from possible losses that might result from failure to keep the promises made in the Note. The Note provides for the payment of late charges in the event that any payment because overdue for a period in excess of fifteen (15) days.

To secure the payment of the sum represented by the Note, the LLC executed and delivered to Greenpoint, on October 11, 2005, the Mortgage, pursuant to which it mortgaged to Greenpoint, its successors or assigns, the premises (“Premises”) located at 1445 Newbridge

Road, North Bellmore, New York, which is described in Schedule A, annexed to the Complaint. The Mortgage was recorded in the office of the Clerk of Nassau County ("County Clerk") on October 26, 2005, and the recording tax was paid. The Mortgage provided for the payment by the mortgagor, at the option of the mortgagee, of installment payments sufficient to pay the taxes payable, or estimated by mortgagee to be payable, during the ensuing 12 months (Mortgage at ¶ 4).

The Mortgage also provided, *inter alia*, that 1) the total indebtedness shall become due at the option of the holder of the Mortgage, after failure to keep any promise or agreement in the Mortgage, including the promise to pay when due the amounts owed to the lender under the Note and Mortgage; 2) in the event that any payment became over due for more than ten (10) days, a late charge of five (5) cents for each dollar (\$1.00) overdue may be charged by the mortgagee; 3) in the event of a default, mortgagor granted mortgagee the right, among others, to enter upon and take possession of the Premises; 4) in the event of a default, the Mortgagee shall be entitled to collect and receive all earnings, revenues, rents, issues, profits and income of the Premises, and Mortgagee may collect rents payable under all leases of the Premises directly from the lessees upon proper notice; 5) the Mortgagee shall be entitled, without notice to any other party or regard to the adequacy of any security for the indebtedness, to the appointment of a receiver of the Premises; and 6) in the event of a foreclosure proceeding, or a bankruptcy, insolvency or similar proceeding following acceleration, notice of prepayment or scheduled maturity, the rate of interest which shall accrue and be payable, and secured by the Mortgage, during the pendency of such proceeding and until the Mortgage is paid in full, shall be the Default Rate, defined as a rate equal to 5.0% per annum, in excess of the interest rate then in effect with respect to the loan, but in no event higher than the maximum rate permitted by the applicable usury law to be charged by the Mortgage.

The LLC executed and delivered to Greenpoint an assignment of leases and rents, pursuant to which the LLC assigned to Greenpoint all leases and lettings of the Premises. By guarantee ("Guarantee") executed by Defendant Mohammad J. Siddiqui ("Guarantor") on October 11, 2005, Guarantor guaranteed the payment when due of all indebtedness of the LLC to the lender.

The Note and Mortgage are held by the Plaintiff, having been assigned by assignment recorded in the office of the County Clerk. The Complaint provides details regarding the assignment of the Note and Mortgage 1) from Greenpoint to Waterfall Victoria Master Fund 2008-1 Grantor Trust Series C, and 2) from Waterfall Victoria Master Fund 2008-1 Grantor Trust Series C to Waterfall Victoria Grantor Trust, Jemcap Series C. The first assignment was dated March 5, 2010 and was recorded on July 7, 2011. The second assignment was dated August 8, 2011 and is intended to be recorded in the County Clerk's office.

The Complaint alleges, further, that Defendants have failed to comply with the terms of the Note and Mortgage by defaulting in the payment of \$2,253.80 for principal and interest, plus installments for taxes and other charges which became due on August 1, 2009 and on the first day of each month thereafter, all of which have remained unpaid for more than thirty (30) days. By reason of these defaults, Plaintiff has elected to declare the balance of the principal indebtedness immediately due and payable. There is now due and owing to Plaintiff the principal sum of \$290,069.90, with interest thereon from July 1, 2009, plus accumulated late charges, together with any sums advanced by Plaintiff on behalf of Defendant.

In addition, to protect its security, Plaintiff may be required to pay taxes, assessments and water rates that are, or may become, liens on the Mortgaged Premises, as well as other charges necessary for the protection of the Premises. Plaintiff requests that any amounts so expended be added to the amount of the principal sum secured by the Note and Mortgage, together with interest from the time of any such payment, and that those amounts be paid to Plaintiff from the proceeds of the foreclosure sale. Plaintiff alleges that no other proceedings have been had for the recovery of the sums secured by the Note and Mortgage.

The Complaint alleges, further, that the Premises, and title thereto, are subject to numerous conditions, including but not limited to 1) the state of facts an accurate survey will show, 2) covenants, restrictions, easements, agreements and reservations, if any, of record, and 3) rights of tenants in possession, if any.

The Complaint also alleges that 1) all of the Defendants have, or may claim to have, an interest in or lien on the Mortgaged Premises, which interest or lien is subordinate to the lien of the Mortgage being foreclosed; 2) Plaintiff shall not be deemed to have waived the election it

previously made by reason of the payment after the date of the commencement of this action, and such election shall continue until the costs and disbursements of this action, and all future defaults under the Note and Mortgage are fully paid; 3) the terms of the Mortgage provide that Mortgagor is responsible for sums paid by Mortgagee, including attorney's fees, for the expense of an action to foreclose; and 4) the New York State Department of Taxation and Finance is named a party defendant to bar its from any interest it may have in the Premises as a result of franchise taxes that may be due and owing from the LLC.

In his Affirmation in Support, Plaintiff's counsel ("Plaintiff's Counsel") provides proof of the filing of the Summons, Verified Complaint and Notice of Pendency (Ex. A to Labeck Aff. in Supp.), as well as affidavits of service reflecting the service of the Summons and Complaint on Defendants Siddiqui, LLC and the New York State Department of Taxation and Finance (*id.* at Ex. C), which were filed with the County Clerk. Plaintiff's Counsel affirms that the time for all Defendants to appear or otherwise move has expired and has not been extended. In addition, since the commencement of this action, no other defendants have been served with a copy of the Summons and Complaint and, upon information and belief, there are no other tenants or occupants residing in the Premises.

Plaintiff's Counsel affirms that Defendants LLC and Siddiqui appeared through counsel and filed an answer with affirmative defenses and counterclaims ("Answer") (Ex. E to Labeck Aff. in Supp.). In their Answer, Defendants deny many of the allegations in the Complaint, affirm that they lack sufficient information to admit or deny others, and refer to the documents set forth in the Complaint. Defendants also assert nine (9) affirmative defenses: 1) Defendants made payments under a forbearance agreement ("Forbearance Agreement") entered into with Plaintiff, pursuant to which Plaintiff agreed not to foreclose on the Premises; 2) there is allegedly misleading language in the Forbearance Agreement regarding Plaintiff's rights in the event of Defendants' default; 3) Plaintiff violated the Fair Debt Collection Act by failing to provide Defendants with a detailed statement of the amounts owed; 4) Plaintiff failed to keep an accurate accounting, and misstated the arrears owed; 5) this foreclosure action is improper in light of the Forbearance Agreement; 6) Plaintiff lacks standing; 7) there was a lack of notice and defective recording of the assignment, 8) service was defective; and 9) the doctrines of waiver and estoppel

are applicable in light of Plaintiff's prior acceptance of late payments from Defendants.

Defendants also assert two (2) counterclaims: 1) Plaintiff made false promises to forbear the foreclosure action if the Defendants entered into a forbearance agreement, and Defendants demand a return of all amounts paid under the Forbearance Agreement; and 2) Plaintiff failed to breached the Forbearance Agreement resulting in the potential loss of Defendant's home.

In her Affidavit in Support, April Garitta ("Garitta") affirms that she is the Attorney-in-Fact of Plaintiff Wells Fargo Bank, National Association as Trustee for Waterfall Victoria Grantor Trust, Jemcap Series C , and is authorized to sign her affidavit on behalf of Plaintiff. Garitta affirms that she has personal knowledge of the matters set forth, or the facts set forth, based on her review of the Note, Mortgage and other loan documents and of business records of Plaintiff related to those documents.

Garrita affirms the truth of the allegations in the Complaint regarding 1) the execution, delivery and terms of the Note, 2) the execution, delivery and terms of the Mortgage, 3) the recording of the Mortgage and payment of recording tax, 4) the assignment from LLC to Greenpoint, 5) the Guarantee executed by Siddiqui, 6) the subsequent assignments of the Note and Mortgage, and Plaintiff's status as the current holder of the Note and Mortgage, 7) Defendants' default by virtue of their failure to make required payments, 8) Plaintiff's declaration of the entire balance immediately due and payable, and 9) the sums owed by Defendants to Plaintiff as a result of their default. Plaintiff provides copies of the Note, Mortgage, recordings, Guarantee and assignments (Exs. A and B to Garrita Aff. in Supp. and Ex. F to Labeck Aff. in Supp.).

Garrita also addresses Defendants' affirmative defenses regarding the Forbearance Agreement (Ex. D to Garrita Aff. in Supp.), and disputes Defendants' contention that Plaintiff may not proceed with the instant action in light of the Forbearance Agreement. The Forbearance Agreement specifically authorizes Plaintiff to proceed with the instant action, in light of the language of paragraph 7, titled "Lender's Rights and Remedies Upon Event of Default," which provides as follows:



Upon and after the occurrence of an Event of Default, all amounts then remaining unpaid under the Loan Documents shall be immediately due and payable, and Lender shall be free to proceed with a foreclosure sale of the premises in furtherance of the foreclosure action which will be commenced by Lender subsequent to execution of this Stipulation. By entering into this Stipulation, Lender shall in no way be considered to have waived or be estopped from exercising any or all of its rights and remedies under the Loan Documents. Nothing contained herein shall constitute a waiver of any or all of the Lender's rights or remedies including the right to proceed with the foreclosure action. Any forbearance by the Lender and acceptance of monies hereunder shall not be deemed an estoppel, prejudice or waiver of Lender's right to proceed with the foreclosure action. Borrower understands that the foreclosure action shall proceed to entry of a Judgment of Foreclosure and Sale. Borrower agrees that if it is in default it will not (1) contest the valuation of the property if a Deficiency Judgment is sought and will consent to a confession of judgment. (2) The lender may require the borrower to give a deed in lieu of foreclosure as security for payments under the forbearance agreement and borrower agrees to execute same. (3) The lender may require the borrower to secure the forbearance agreement with a confession of judgment and borrower agrees to execute same. (4) The lender may require the borrower to direct all rents be paid to the lender and borrower agrees to same. (5) The lender may require that the borrower hire (or replace) a property manager for a commercial project and borrower agrees to same. (6) The borrower admits that the loan documents are enforceable. (7) The lender may require and borrower agrees to renew the security documents and may acquire additional security.

Garitta affirms that the Forbearance Agreement was entered into at the request of the Defendants, and Defendants never expressed any lack of understanding of the Agreement. Garitta explains that the Forbearance Agreement provides Defendants with a year to bring their Mortgage payments current and reflects Plaintiff's agreement to vacate the consented-to judgment of foreclosure and sale, provided Defendants do not default on the Agreement. Garitta submits that, in light of the significant consideration provided by Plaintiff, Defendants' claim of unconscionability is fundamentally lacking in merit.

Garitta affirms that Plaintiff made no oral representations contrary to those set forth in the Forbearance Agreement. She also submits that Defendants' affirmative defenses are meritless and should be stricken on the grounds, *inter alia*, that 1) Defendants' defense regarding the Fair Debt Collection Practices Act is inapplicable because that statute only applies to consumer debts, not commercial debts; 2) Plaintiff has kept accurate accounting records, and Defendants have not disputed that they have defaulted in making required payments; 3) Plaintiff has demonstrated its



standing by demonstrating, through the Allonges and Assignments provided, that it is the owner and holder of the Note and Mortgage; 4) Plaintiff has established that the Note and Mortgage were properly recorded and assigned; 5) Plaintiff has demonstrated proper service on Defendants; and 6) Defendants' claims of waiver and estoppel are belied by the terms of the Forbearance Agreement.

In opposition, Siddiqui submits that Plaintiff, by executing the Forbearance Agreement, waived its right to foreclose on the Premises. Siddiqui cites to payment provisions in the Forbearance Agreement, and affirms that he has made all payments on a timely basis, and only has approximately three (3) payments left. He submits that, upon his last payment, his arrears were to be forgiven, and he would resume making regular payments of \$4,000 per month. Thus, he argues, this dispute will be "moot" when he completes his payment schedule under the Forbearance Agreement (Siddiqui Aff. in Opp. at ¶ 6). Siddiqui affirms that Plaintiff made oral representations not present in the Forbearance Agreement, and he agreed to the Agreement without counsel "despite that English is not my first language based on such representation" (*id.* at ¶ 7). Siddiqui adds that he has "always been confused as to the amount of the loan and "believe[s] that the Plaintiff has engaged in major accounting errors" (*id.* at ¶ 8).

In reply, Plaintiff reaffirms its position that the defenses asserted by Defendants "have no relevance to this matter, are without merit, and are insufficient to defeat Plaintiff's right to summary judgment" (Labeck Reply Aff. at ¶ 2). Plaintiff notes that the language of the Forbearance Agreement reflects that Defendants "specifically consented to the entry of a Judgment of Foreclosure and Sale, with Plaintiff agreeing to vacate such Judgment should Defendants continue to make the monthly payments of interest, escrow and arrears" (*id.* at ¶ 4). Plaintiff has affirmed that it made no oral representations to the contrary, and that Defendants never expressed a lack of understanding of the terms of the Forbearance Agreement. Plaintiff also submits that 1) Defendants' challenges to the assignment of the Note and Mortgage are without merit; 2) Defendants' claim of accounting errors is without support; and 3) Defendants have failed to demonstrate that discovery is likely to lead to any relevant facts necessary to their defense, or to any triable issue of fact.

### C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to judgment by establishing, through the verified allegations in the Complaint and accompanying documentation, that 1) the LLC executed and delivered the Note and Mortgage; 2) Plaintiff is the holder and owner of the Note and Mortgage, which Plaintiff has produced; 3) Siddiqui executed the Guarantee, pursuant to which he guaranteed the LLC's payment under the applicable instruments; 4) Defendants failed to make required payments pursuant to the Note and Mortgage; and 5) Plaintiff declared the balance of the principal indebtedness immediately due and payable. Plaintiff also contends that, as outlined herein, Defendants' Answer should be stricken on the grounds that 1) the general denials in the Answer are without merit and fail to raise a triable issue of fact; and 2) Defendants agreed, and the Forbearance Agreement states, that any forbearance by Plaintiff would not preclude Plaintiff from enforcing any such right or remedy in the future.

Defendants submit that the Court should deny Plaintiff's motion on the grounds that Defendants have presented issues of fact regarding whether 1) the instant dispute will be resolved, pursuant to the Forbearance Agreement, if Defendants make certain payments in the next several months; 2) Plaintiff made oral representations, not present in the Forbearance Agreement, that it would not foreclose on the Premises; 3) the assignments of the Note and Mortgage were valid; and 4) Plaintiff has provided an accurate accounting of the sums due by Defendants. Defendants argue that Plaintiff should be required to comply with Defendants' discovery demands (Ex. C to Weiss Aff. in Opp.).

## RULING OF THE COURT

### A. Summary Judgment

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is

any doubt regarding the existence of a triable issue of fact. *Id.* The mere fact that discovery has not taken place does not preclude a motion for summary judgment. *Landes v. Sullivan*, 235 A.D.2d 657, 658 (3d Dept. 1997)

#### B. Relevant Contract Principles

Agreements are to be construed in accordance with the parties' intent. When parties set down their agreement in a clear complete document, their writing should be enforced according to its terms. *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004), quoting *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). Where the parties' intent is discernible from the plain meaning of the language of the contract, there is no need to look further. *Evan v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004).

Where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence. *Ruttenberg v. Davidge Date Sys. Corp.*, 215 A.D.2d 191, 193 (1<sup>st</sup> Dept. 1995). When, however, the meaning of a contract is ambiguous and the intent of the parties becomes a matter of inquiry, a question of fact is presented that cannot be resolved on motion papers alone. *Id.*, quoting *Eden Music Corp. v. Times Sq. Music Publs.*, 127 A.D.2d 161, 194 (1<sup>st</sup> Dept. 1987). Where interpretation of a contract is susceptible to varying reasonable interpretations, and intent must be gleaned from disputed evidence or from inferences outside the written words, resolution by the fact finder is required. *Time Warner Entertainment Co., L.P. v Brustowsky*, 221 A.D.2d 268 (1<sup>st</sup> Dept. 1995), *app. den.*, 89 N.Y.2d 809 (1997).

#### C. Foreclosure

In moving for summary judgment 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. *Wells Fargo v. Webster*, 61 A.D.3d 856, 856 (2d Dept. 2009), citing *Republic Natl. Bank of N.Y. v. O'Kane*, 308 A.D.2d 482, 482 (2d Dept. 2003), quoting *Village Bank v. Wild Oaks Holding*, 196 A.D.2d 812, 812 (2d Dept. 1993). In *Wells Fargo, supra*, the Second Department held that plaintiff bank sustained its initial burden of demonstrating its entitlement to judgment as a matter of law by submitting proof of the existence of the note, mortgage, and consolidation agreement, and the defendants' default in payment. *Id.*

Accordingly, it was incumbent on the defendants to demonstrate, by admissible evidence, the existence of a triable issue of fact as to a *bona fide* defense. *Id.* In light of their failure to do so, the Second Department held that the trial court properly granted summary judgment to the plaintiff. *Id.*

#### D. Standing

In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced. *U.S. Bank National Assoc. v. Dellarmo*, 2012 N.Y. App. Div. LEXIS 2437, \* 4 (2d Dept. 2012), quoting *Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 279 (2d Dept. 2011). Where a defendant raises the issue of standing, the plaintiff must prove its standing to be entitled to relief. *Id.*, citing, *inter alia*, *CitiMortgage, Inc. v. Rosenthal*, 88 A.D.3d 759 (2d Dept. 2011). Moreover, while assignment of a promissory note also effectuates assignment of the mortgage, the converse is not true; as a mortgage is merely security for a debt, it cannot exist independently of the debt and, thus, a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it. *Id.* The failure to record an assignment prior to the commencement of the action is not necessarily fatal, as an assignment of a note and mortgage need not be in writing and can be effectuated by physical delivery. *Id.* at \* 4-5, quoting *Silverberg, supra*, at 280.

#### E. Amendment of Caption and Appointment of Referee

Real Property Actions and Proceedings Law (“RPAPL”) § 1361(2) provides that the Supreme Court, by reference or otherwise, shall ascertain the amount due to any claimants and the priority of any liens for purposes of the distribution of surplus money. *American Holdings Invest Corp. v. Josey*, 2010 N.Y. App. Div. LEXIS 2457 (2d Dept. 2010). A referee may inquire into and determine all questions of law and fact, and every question tending to show the equities of the claimant, to decide to whom surplus money belongs. *Id.*, quoting *Wilcox v. Drought*, 36 Misc. 351, 352-353 (Sup. Ct. N.Y. County, 1901), *aff’d*, 71 App. Div. 402 (1<sup>st</sup> Dept. 1902).

#### F. Deficiency Judgment

RPAPL § 1371, titled “Deficiency judgment,” provides, in pertinent part, as follows:

1. If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds, pursuant to the directions contained in such judgment, the amount thereof to be determined by the court as herein provided.

2. Simultaneously with the making of a motion for an order confirming the sale, provided such motion is made within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher.

#### G. Application of these Principles to the Instant Action

The Court concludes that Plaintiff has demonstrated its entitlement to judgment for the relief demanded in the Complaint by establishing that a) Plaintiff is the holder and owner of the Mortgage and Note; 2) Defendants are in default by virtue of their failure to make required payments pursuant to the Mortgage, Note and Guarantee; and 3) following the Defendants' default, Plaintiff provided notice of default and accelerated payment of the entire indebtedness. Moreover, the Court concludes that the conclusory denials, affirmative defenses and counterclaims in the Answer do not create an issue of fact defeating Plaintiff's right to judgment. The Forbearance Agreement specifically states, *inter alia*, that Lender shall "in no way be considered to have waived or be estopped from exercising any or all of its rights and remedies under the Loan Documents. Nothing contained herein shall constitute a waiver of any or all of the Lender's rights or remedies including the right to proceed with the foreclosure action. Any

forbearance by the Lender and acceptance of monies hereunder shall not be deemed an estoppel, prejudice or waiver of Lender's right to proceed with the foreclosure action." The Court concludes that the Forbearance Agreement is straightforward and unambiguous and, therefore, it would be inappropriate to consider Defendants' claim of oral representations by Plaintiff that are contrary to the terms of the Forbearance Agreement. The Court also concludes that Defendants' claims regarding their ability to speak and understand the English language do not raise a triable issue of fact as to a bona fide defense. Defendants had an obligation to have someone explain the Forbearance Agreement to them if necessary. *See Valley National Bank v. Deutsch*, 88 A.D.3d 691 (2d Dept. 2011) (no issue of fact relating to bona fide defense raised to foreclosure action where defendants, who claimed limited ability to read and comprehend English language and lack of understanding of relevant documents, failed to show reasonable effort to have documents read to them).

In light of the foregoing, the Court directs that Plaintiff's motion is granted in its entirety.

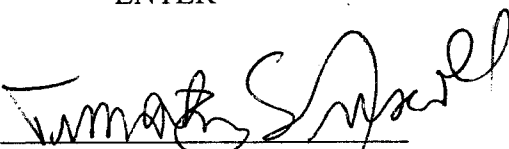
The Court declines to sign the proposed Order provided by Plaintiff, and directs Plaintiff to submit Order and Judgment on ten (10) days notice.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY  
May 9, 2012

  
HON. TIMOTHY S. DRISCOLL  
J.S.C.

X2X

**ENTERED**

**MAY 14 2012**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**