

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X **TRIAL/IAS PART 17**
MALBEC FUNDING, LCC,
Plaintiff, INDEX # 12631/12

-against-
4235 HOLDING CORP., 2407 HOLDING CORP., THE NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE, BNB BANK, NA, 2407 GRAND AVE. REALTY CORP., 4235 MERRICK RD. REALTY CORP., and "JOHN DOE#1" THROUGH "JANE DOE #10", the last 10 names being fictitious and unknown to the Plaintiff, the persons or parties intended being the occupants, tenants, persons or entities, if any, having or claiming an interest in or lien upon the mortgaged premises,
Defendants.

**Motion Seq. 1
Motion Date 3.8.13
Submit Date 3.22.13**

-----X

| The following papers were read on this motion: | Papers Numbered |
|--|-----------------|
| Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... | 1 |
| Answering Affidavit | 2 |
| Reply Affidavit..... | 3 |

Motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment to the plaintiff and striking the answer of defendants 4235 Holding Corp. and 4207 Holding Corp. (the defendants) and appointing a referee to compute the amount due the plaintiff on the Note and Mortgage is denied without prejudice.

This is an action to foreclose a mortgage. According to the complaint the defendants executed a mortgage dated July 22, 2010 in the sum of \$350,000 in favor of the plaintiff on real property in Nassau County. The mortgage note provides for 10% interest only, payable in monthly amounts of \$667 until the maturity date of July 21, 2015, when the entire principal

amount and interest accrued (in the sum of \$2,917 per month that is deferred until maturity date) becomes due.

Paragraph 5 of the verified complaint states that mortgage note is dated July 22, 2010. The mortgage refers "to a certain bond, note or other obligation bearing every date herewith" (July 22, 2010). A plaintiff who seeks summary judgment on its claim for foreclosure and sale establishes a *prima facie* case for such relief by the production of copies of the mortgage, the *North Bright Capital, LLC v 705 Flatbush Realty, LLC*, 66 AD3d 977; *Wells Fargo Bank Minnesota v Perez*, 41 AD3d 590). The moving papers fail to establish the plaintiff's entitlement to summary judgment since the unpaid mortgage, a copy of which is annexed to the summons and complaint, is not dated July 22, 2010, but rather August 25, 2009. The attorneys for the defendants raised this defect in the opposing papers. In order to rectify this error, the attorney for the plaintiff submitted a Reply Affirmation requesting the court reform the note based on "mutual mistake" so that its date conforms with the actual execution and delivery (*see Speranza v Repro Lab, Inc.*, 62 AD3d 49, 53-54). The application to reform the note made for the first time in the reply affirmation is procedurally improper (*see Lumbermen's Mutual Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 630). A movant is generally precluded from relying "on evidence submitted for the first time in its reply papers" to sustain its burden on a motion for summary judgment (*Rengifo v City of New York*, 7 AD3d 773; *Adler v Suffolk County Water Authority*, 306 AD2d 229).

The court is constrained to deny the motion for summary judgment without prejudice, and does not need to address the remaining arguments by respective counsel at this time.

ORDERED, that all parties shall appear at a preliminary conference at the supreme courthouse, 100 Supreme Court Drive, Mineola, N.Y., lower level, on June 27, 2013 at 9:30 a.m. This directive, with respect to the date of the conference, is subject to the right of the clerk to fix an alternate date should scheduling. All parties are forewarned that failure to attend the conference may result in judgment by default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.); and it is further

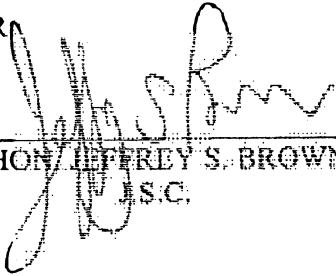
ORDERED, that the attorneys for the plaintiff shall serve a copy of this order on the preliminary conference clerk and the attorneys for the defendant.

In the event this matter is settled, counsel shall notify chambers of same in writing.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
May 23, 2013

ENTER



HON. JEFFREY S. BROWN
J.S.C.

Attorney for Plaintiff
Irwin Popkin, Esq.
445 Broad Hollow Road, Ste. 25
Melville, NY 11747
631-281-0030
631-281-0174

Attorney for Defendant 4235 Holding
and 2407 Holding
Gary Rosen Law Firm, PC
1010 Northern Boulevard, Ste. 322
Great Neck, NY 11021
516-437-3400