

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**  
Justice

TRIAL/IAS, PART 19  
NASSAU COUNTY

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**LASALLE BANK NATIONAL ASSOCIATION,  
AS TRUSTEE FOR MERRILL LYNCH FIRST  
FRANKLIN MORTGAGE LOAN TRUST,  
MORTGAGE LOAN ASSET-BACKED  
CERTIFICATES, SERIES 2007-2  
150 Allegheny Center Mall  
Pittsburgh, PA 15212**

**Plaintiff,**

**-against-**

**LOUIS YOUNGS, GEORGE Y. SMALLS, JR.,  
SANDRA YOUNGS, CHRISTINA MALLAY,  
DIRECT MERCHANTS CREDIT CARD BANK,  
EMPIRE OF AMERICA, FSB, NEW YORK STATE  
DEPARTMENT OF TAXATION AND FINANCE,**

**JOHN DOE (Said name being fictitious, it being the  
intention of Plaintiff to designate any and all occupants  
of premises being foreclosed herein, and any parties,  
corporations or entities, if any, having or claiming an  
interest or lien upon the mortgaged premises.)**

**Defendants.**

**DECISION AND ORDER**

**MOTION SUBMITTED:  
November 8, 2010  
MOTION SEQUENCE:01  
INDEX NO. 2075-09**

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**The following papers and the attachments and exhibits thereto have been read on this  
motion:**

Notice of Motion	1
Affidavit in Opposition	2
Reply Affirmation	3

The Plaintiff, LaSalle National Bank Association, as Trustee for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-backed Certificates, Series 2007-2 ("LaSalle") moves this court for an order, *inter alia*: granting it summary judgment against; Defendant George Y. Smalls, Jr. ("Smalls"); appointing a referee to determine the amount due LaSalle and ascertain whether the subject Property can be sold in parcels; deeming all non-appearing and non-answering Defendants to be in default; and amending the caption by deleting LaSalle's address from the caption and eliminating defendant "John Doe" as a party defendant. For the reasons that follow, the Plaintiff's motion is granted in part and denied in part.

### **Background**

The property which is the subject of the instant foreclosure action is located at 113 Stevens Street in Freeport, New York ("The Property"). The Property is subject to numerous mortgage encumbrances. One of such encumbrances concerns a refinanced home equity mortgage loan with Wells Fargo Financial Credit Services New York, Inc ("Wells Fargo") in the amount of \$298,581. At the time that mortgage was given, in December 2005, Defendant Smalls, a 50% owner of the Property, purportedly, was not present at the closing and never signed the loan documents appertaining to the Wells Fargo loan (Affidavit in Opposition to Summary Judgment Motion at ¶¶ 5, 6).

Another home equity mortgage loan on the Property in the amount of \$346,500 was given by First Franklin Financial Corporation ("First Franklin") on February 12, 2007. On January 29, 2009, First Franklin assigned this mortgage to Plaintiff LaSalle Bank (Ex. "H" to Affidavit in Support of Motion for Summary Judgment and Order of Reference) (The First Franklin loan assigned to LaSalle will be referred to herein as the "LaSalle loan" or "LaSalle mortgage"). It is the LaSalle mortgage which is currently being foreclosed upon and which is the subject of the instant motion.

Smalls claims that he co-signed the LaSalle mortgage for purposes of making improvements and repairs to the Property. However, according to Smalls, unbeknownst to him, the loan was not used for home improvements but, rather, was used to pay off the prior Wells Fargo mortgage given on December 30, 2005 (Ex. "P" to Affidavit in Support of Motion for Summary Judgment at ¶ 6). Smalls asserts that LaSalle conspired with Defendant Sandra Youngs to defraud Smalls of all the equity in his house when LaSalle "fraudulently" stamped on the LaSalle mortgage documents "Signing for the purpose of waiving any and all Homestead Rights and/or any and all dower or curtesy [sic] rights" (Affidavit in Opposition to Summary Judgment Motion at ¶ 11). Smalls alleges that the phrase, "Signing for the purposes of . . ." was not present at the time he co-signed the mortgage and insists that such language was inserted after he signed the loan (Affidavit in Opposition to Summary Judgment Motion at ¶ 11).

## *Procedural History*

On February 5, 2009, LaSalle commenced a foreclosure action against, *inter alia*, Defendants Smalls, Louis Youngs and Sandra Youngs (Ex. "L" to Motion for Summary Judgment and Order of Reference). Neither Louis nor Sandra Youngs answered the complaint or appeared.<sup>1</sup> Smalls answered the complaint and has appeared *pro se* in this action. In his answer, Smalls asserts the following affirmative defenses:

1. This Home Equity Mortgage lend by First Franklin Financial Corporation to Louis Youngs and Sandra Youngs on February 12<sup>th</sup> 2007 and fraudulent and therefore void and not enforceable against the Alleged Defendant George Y. Smalls, Jr., and the Alleged Defendant George Y. Smalls, Junior's residence or house located at 113 Stevens Street, Freeport, New York 11520.
2. This Home Equity Mortgage was lent by [LaSalle] to paid off a [Wells Fargo] Mortgage which was unlawfully and unjustly and fraudulently lent to two of the named Defendants Louis Youngs and Sandra Youngs on December 10<sup>th</sup> 2005 without the Alleged Defendant George Y. Smalls, Jr., permission and knowledge and authorization and mostly importantly signature on that Home Equity Mortgage on December 30<sup>th</sup> 2005.
3. [LaSalle] knew or should have known that the aforementioned [Wells Fargo] Mortgage was fraudulent and not signed by the Alleged Defendant George Y. Smalls, Jr., a 50% owner of property or house located at 113 Stevens Street, Freeport, New York 11520 upon which this Home Equity Mortgage was granted by [Wells Fargo] to the two Defendants Louis Youngs and Sandra Youngs on December 30<sup>th</sup> 2005.
4. Further, the Alleged Defendant George Y. Smalls, Jr. a 50% owner of property or house located at 113 Stevens Street, Freeport, New York 11520 was not present at the closing and signing of his [Wells Fargo] Mortgage on December 30, 2005. And, there fore any signature of the Alleged Defendant George Y. Smalls, Junior is a forgery and has been determined as a forgery by a Court Qualified Forensic Examiner named Robert Baier. (See Exhibit-A: Affidavit of Forensic Document Examiner named Robert Baier).
5. The Defendant affirms because that this Home Equity Mortgage lent to the two named Defendants Louis Youngs and Sandra Youngs was attempt to defrauded

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<sup>1</sup>The other named defendants, Christina Mallay, Direct Merchants Credit Card Bank, Empire of America, FSB, New York State Department of Taxation and Finance (Ex. "Q" to Affidavit in Support of Motion for a Renewed Motion to Amend Complaint & Add Party) also did not appear or answer (Ex. "B" to Affidavit in Support of Motion for Summary Judgment and Order of Reference).

the Alleged Defendant George Y. Smalls, Junior out of Homestead Rights, Dower Rights, and Cutesy Rights where [Lasalle] conspired with the named Defendants Louis Youngs and Sandra Youngs and had someone at First Franklin Financial Corporation stamped the words "Signing for the purpose of waiving any and all Homestead Rights, and/or any and all dower or cutesy rights" after I Defendant George Y. Smalls, Jr. Co-signed this Home Equity Loan Mortgage on February 12<sup>th</sup> 2007 because this waiver of Homestead Rights and dower rights and cutesy rights was not on the Home Equity Loan Mortgage document when I, Defendant George Y. Smalls, Jr., signed that space on Home equity loan mortgage on 2/12/07. (See Exhibit-B: Page 14 of the Home Equity Loan Mortgage from First Franklin Financial corp., dated February 12<sup>th</sup> 2007).

6. Furthermore, on November 20<sup>th</sup> 2008 the alleged Defendant George Y. Smalls, Jr., began several civil actions in the Nassau County Supreme Court under index number 021032/08 one of the named Louis Youngs and another named Defendant in this complaint Sandra Youngs under index number 021033/08 for unlawfully and unjustly and fraudulently taking all the equity out of the Alleged Defendant George Y. Smalls, Junior a senior citizen 73 years of age house and for misrepresenting and lying that they were going to use the money for these various Home Equity Mortgages to make needed repairs and renovations to the Alleged Defendant George Y. Smalls, Junior house. The named Defendants Louis Youngs and Sandra Youngs never Shared any of the Home Equity Mortgage monies they received from Plaintiff's Home Equity Mortgage or any of the previous Home Equity Mortgages they unlawfully and unjustly and fraudulently secured.

(Ex. "P" to Motion for Summary Judgment and Order of Reference).

*The branch of LaSalle's motion seeking summary judgment*

As noted, LaSalle moves this court for an order granting it summary judgment against Smalls, foreclosing the mortgage, dismissing his answer, and appointing a referee to determine the amount due and to ascertain whether the Property may be sold in parcels.<sup>2</sup>

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<sup>2</sup>This court notes that pursuant to RPAPL 1304 and CPLR 3408, in a particular residential foreclosure action in which the defendant is a resident of the property sought to be foreclosed, the court must hold a mandatory settlement conference in an effort to reach a resolution to avoid the loss of defendant's home. Here, LaSalle has indicated that the mortgage at issue is one subject to the mandatory settlement conference requirement. A settlement conference was held on June 4, 2009, which was attended by defendant Louis Youngs (Ex. "A" to Motion for Summary Judgment and Order of Reference). In paragraph 10 of an affidavit submitted by Smalls in an action in a related matter, *Smalls v Youngs*, Index No. 21032/08, which is *sub judice* and which the court takes judicial notice of, Smalls confirms that he attended the settlement conference on June 4, 2009.

Smalls opposes the motion on the following grounds: the LaSalle mortgage to Louis and Sandra Youngs is “fraudulent and therefore void and not enforceable against the Defendant George Y. Smalls, Jr.”; that the LaSalle mortgage was used to pay off the Wells Fargo loan which had been “unlawfully and unjustly and fraudulently lent to” Sandra and Louis Youngs on December 30, 2005 without Smalls’ “permission and knowledge and authorization and most important signature”; First Franklin knew or should have known that the Wells Fargo loan was fraudulent and not signed by Smalls and that Smalls’ signature was a forgery (Affidavit in Opposition to Summary Judgment Motion at ¶¶ 4-6).

Smalls also asserts that Wells Fargo and First Franklin “did everything in their power to keep me from knowing how much the Defendant Sandra Youngs and her husband Louis Youngs were borrowing against my house at the home equity mortgage loan closings by doing such things as the bank officers of these financial institutions at the closings covering with their hands the amount which the defendant and her husband were borrowing against my house” (Affidavit in Opposition to Summary Judgment Motion at ¶ 8). Smalls further contends that First Franklin aided and abetted Sandra and Louis Youngs in an “elaborate scam/scheme to defraud” Smalls out of all of the equity in his house (Affidavit in Opposition to Summary Judgment Motion at ¶¶ 9, 11). First Franklin’s aiding and abetting included the purportedly “fraudulent” stamping of the statement “Signing for the purpose of waiving any and all Homestead Rights and/or all Dower or Cutesy Rights” *after* Smalls co-signed the First Franklin mortgage (Affidavit in Opposition to Summary Judgment Motion at ¶ 11). Given this purported fraud, Smalls seeks rescission of the LaSalle mortgage (Affidavit in Opposition to Summary Judgment Motion at ¶ 14).

In support of the argument that his signature on the Wells Fargo loan was a forgery, Smalls submits an affidavit of a “Certified Document Examiner” who concluded that “[a]fter a thorough analysis of all of the documents submitted using accepted methods of forensic document examination, it is my opinion as a Certified Document Examiner that ‘[t]here is evidence suggesting that the handwriting samples compared were not written by the same person but not enough material to support a definite conclusion.’” (Ex. “B” to Opposition to Summary Judgment Motion at ¶ 4).<sup>3</sup>

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<sup>3</sup> Smalls also submitted the affidavit of George McDermott, a “mortgage specialist” who indicated that Smalls would not qualify for a reverse mortgage due to the actions of Louis and Sandra Youngs (Ex. “D” to Affidavit in Opposition to Summary Judgment Motion at ¶ 5).

## The Court's Determination

### *The branch of LaSalle's motion seeking summary judgment*

In order to establish *prima facie* entitlement to judgment as a matter of law, the plaintiff must submit the production of the mortgage, the unpaid note and evidence of the default (*Capstone Business Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882 [2d Dept 2010]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812 [2d Dept 1993]). Here, LaSalle has submitted, in support of its motion, the mortgage and note, as well as an affidavit attesting to the default (Exs. "C", "F" and "G" to Motion for Summary Judgment and Order of Reference).

The note was signed by both Sandra and Louis Youngs but not signed by Smalls (Ex. "F" to Motion for Summary Judgment and Order of Reference).<sup>4</sup> The mortgage was signed by Sandra Youngs, as borrower, Louis Youngs, as borrower, and George Smalls, as non-borrower and contained language that Smalls was "Signing for the purpose of waiving any and all Homestead Rights and/or any and all dower or cutesy rights." (Ex. "G" to Motion for Summary Judgment and Order of Reference).

The affidavit of Bryan Kusich, Vice President of Home Loan Services, Inc., servicer for LaSalle Bank, establishes that he has knowledge of the facts constituting the claim, which he recites therein, and that the defenses raised by Smalls in his answer are without merit (Affidavit in Support of Motion for Summary Judgment). The Kusich affidavit also establishes that the loan is in default and has been in default since October 2008 (Ex. "C" to Motion for Summary Judgment and Order of Reference). These submissions demonstrate LaSalle's *prima facie* entitlement to a judgment of foreclosure as a matter of law (*Wasserman v Harriman*, 234 AD2d 596, 597 [2d Dept 1996]; *FGH Realty Credit Corp v VRD Realty Corp.*, 231 AD2d 489 [1996]).

Having made a *prima facie* showing, it was incumbent upon the Defendant to assert any defenses or counterclaims which could raise a triable issue of fact (*Capstone Business Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882, 883 [2d Dept 2010]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812 [2d Dept 1993]).

Here, Smalls' defense to the foreclosure by LaSalle is based on a multitude of allegations of fraud. The first fraud allegation concerns Smalls' signature on the Wells Fargo loan which, according to Smalls, is a forgery. The second fraud allegation

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<sup>4</sup> The only portion of the note signed by Smalls was the Addendum to Promissory Note and Security Agreement which referred to the New York State Balloon Loan Disclosure. On that Addendum, Smalls signed "for the purpose of waiving and all Homestead Rights and/or any and all dower or cutesy [sic] rights" (Ex. "F" to Motion for Summary Judgment and Order of Reference).

concerns Smalls' signature on the First Franklin Loan and the insertion of waiver of rights after Smalls signed the loan. Another purported fraud concerns the fact that the loan proceeds of the LaSalle loan were used to pay off the prior Wells Fargo loan rather than home improvements, as promised by Sandra and Louis Youngs. Last, Smalls asserts that First Franklin knew, or should have known, that the signature on the Wells Fargo loan was a forgery.

For the reasons that follow, none of the fraud allegations are sufficient to rebut Lasalle's *prima facie* showing of its entitlement to summary judgment.

In order to sustain a finding of fraud, the following elements are required: representation of a material fact, made with knowledge of that falsity, with the intent to deceive, justifiable reliance and ensuing damages (*Kline v Taukpoint Realty Corp.*, 302 AD2d 433 [2d Dept 2003]). In addition, the affirmative defense of fraud must be pleaded with particularity by stating in detail the circumstances constituting the wrong (CPLR 3016[b]).

First, the purportedly forged signature on the Wells Fargo loan is not at issue as it is not the Wells Fargo loan which is being foreclosed (*Langford v Cameron*, 73 AD2d 1001 [3d Dept 1980] [no relationship between the fraudulent representations alleged and the note which is the subject of the complaint]). Moreover, Smalls provides no indicia as to how First Franklin knew, or should have known, that the signature on the prior Wells Fargo loan was forged and, thus, any assertion that LaSalle engaged in fraud in that regard is unsupported by any factual allegations and is conclusory in nature (*Fink v Citizens Mortgage Banking Ltd*, 148 AD2d 578 [2d Dept 1989]).

With respect to the First Franklin (now LaSalle) loan, which is the subject of the instant foreclosure action, Smalls does not dispute that he signed the mortgage but only alleges fraud with respect to the particular language allegedly inserted after he signed the mortgage. This bare conclusory allegation, without more detail and particularity constituting the wrong, is insufficient to rebut Lasalle's entitlement to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557 [1980] [mere conclusions or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment]; *Mahopac National Bank v Baisley*, 244 AD2d 466 [2d Dept 1997]), especially given the "heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties" so much so that a "high order of evidence is required to overcome that presumption" (*Chimart Assoc., v Paul*, 66 NY2d 570 [1986] [citations omitted]; *Weed v Weed*, 222 AD2d 800 [3d Dept 1995] [party who sought reformation of a mortgage based upon fraud could not establish fraud given the clear and convincing evidence required to make such a showing]; *SMG Assoc. v Fine*, 204 AD2d 429, 430 [2d Dept 1994] [where parties executed a deed and mortgage, and one party made conclusory assertion that the complained of provision was added by fraud or mistake and denied having agreed to it, the complaining party could not defeat a

motion for summary judgment by asserting in conclusory fashion that owing to fraud or mistake, the writing did not express his understanding of the agreement]).

Furthermore, the alleged fraud based upon the fact that the loan proceeds were used to pay off a prior loan rather than used for home repairs and improvements is immaterial to the fact that the money was borrowed with an obligation to be paid back, the failure of which could result in the property being foreclosed upon. Based on the foregoing, LaSalle's motion for summary judgment must be granted.

*The branch of LaSalle's motion seeking a Default Judgment*

In its motion, LaSalle also requests that all "non-appearing and non-answering defendants be deemed in default, and said defaults be fixed and determined" (Affidavit in Support Motion for Summary Judgment and Order of Reference). For the reasons that follow, the branch of LaSalle's motion seeking a default judgment against the non-answering and non-appearing Defendants is granted as to Louis Youngs and Sandra Youngs and denied as against the remaining non-answering, non-appearing defendants.

Pursuant to CPLR 3215, upon any application for a judgment by default, the applicant must submit proof of service of the summons and complaint, an affidavit from a party of the proof of the facts constituting the claim, the default, and the amount due (*Mercury Casualty Co. v Surgical Center at Millburn, LLC*, 65 AD3d 1102 [2d Dept 2009]). In the absence of either a complaint verified by a party or a proper affidavit by the party or its authorized agent, entry of judgment by default would be improper.

Here, the affidavit in support of the default application was submitted by Bryan G. Kusich, Vice President of Home Loan Services, Inc., the servicer for LaSalle. Kusich's affidavit is sufficient to establish entitlement to judgment by default against Louis Youngs and Sandra Youngs. In contrast, the affidavit is insufficient to establish entitlement to the same relief as against the other "defaulting" defendants. In this regard, the affidavit does not contain any recitation as to the "facts constituting the claim" as against the non-answering and non-appearing Defendants. With respect to these Defendants, the affidavit only asserts that the Defendants defaulted (Affidavit in Support of Motion for Summary Judgment and Order of Reference at ¶ 8). Moreover, the defect is not remedied by reference to the complaint, which was verified by counsel only.

It is also relevant to note that the complaint fails to assert a cause of action against Defendant New York State Department of Taxation and Finance altogether. In this regard, the only mention of any purported claim as against this defendant is Schedule C annexed to LaSalle's complaint. Schedule C indicates that New York State is the "[h]older of a warrant against George Smalls & Lula Smalls, 156 Carnegie Ave., Elmont, NY 11003-1213, filed the 30<sup>th</sup> day of October, 2008 in the Office of the Nassau County Clerk, in the amount of \$6,563.31" (Ex. "L" to Motion for Summary Judgment and Order of Reference). The mere mention of a warrant in a document annexed to the complaint is



insufficient to make out a claim, however. Nowhere else in the complaint does LaSalle set forth its claim with respect to the New York State Department of Taxation and Finance. Indeed, it is unclear to the court who George Smalls and Lula Smalls are and whether they have any connection to the Property at issue in this foreclosure proceeding. Nor is it alleged that a public search revealed the existence of a tax warrant held by the New York State Department of Taxation.

Based on the foregoing, it is hereby ordered that: the branches of LaSalle's motion for summary judgment of foreclosure against Smalls, and for a default judgment against Louis Youngs and Sandra Youngs, are granted; in addition, LaSalle's application seeking the appointment of a referee (*Neighborhood Housing Serv. of New York City, Inc. v Meltzer*, 67 AD3d 872, 874 [2d Dept 2009]), and the deletion of defendant John Doe as a party defendant and deletion of LaSalle's address from the caption, with the caption to be amended accordingly, is granted (*Neighborhood Housing Serv. of New York City, Inc. v Meltzer*, 67 AD3d at 874, *supra*; *Empire State Bank, N.A. v DiMattina*, 26 Misc3d 1210(A) [Sup Ct Richmond County 2010]; *Deutsche Bank National Trust Co. v Campbell*, 26 Misc3d 1206(A) [Sup Ct Kings County 2009]; *NYCTL 2005-A Trust v Theodoropoulos*, 15 Misc3d 1102(A) [Sup Ct Queens County 2007]); the branch of the motion seeking an order striking Smalls' answer with permission to treat the answer of Defendant Smalls as a limited notice of appearance, to the extent not already determined by virtue of the court's grant of summary judgment, is granted to the extent that any defenses asserted in the answer are dismissed (*First Nationwide Bank, FSB v Goodman*, 272 AD2d 433 [2d Dept 2000]). It is further ordered that the branch of LaSalle's motion seeking a judgment of default against defendants Christina Mallay, Direct Merchants Credit Card Bank, Empire of America, FSB, and New York State Department of Taxation and Finance is hereby denied.

Submit proposed order of appointment of referee. Upon said appointment, the within order shall be served by the plaintiff upon the referee along with the order of appointment. In addition, the plaintiff's attorney shall comply with the Rule of the Chief Administrative Judge of the Courts dated October 20, 2010 within 20 days of the date hereof.

This constitutes the decision and order of the court.

Dated: January 26, 2011

  
Hon. Vito M. DeStefano, J.S.C.

**ENTERED**  
FEB 01 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE