

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: Hon. Edward G. McCabe,
Supreme Court Justice

FORECLOSURE PART NASSAU COUNTY

M&T BANK A/K/A MANUFACTURERS
AND TRADERS TRUST COMPANY SUCCESSOR
BY MERGER TO M&T MORTGAGE CORPORATION
One Fountain Plaza, 6th Floor
Buffalo, NY 14203

INDEX NO. 18912/08

Plaintiff,

MOTION SEQ. NO.: 1

-against-

PATRICK J. LOPRESTI, LINDA DEVITO A/K/A
LINDA M. DEVITO, LORAINÉ BELLIO AKA
LORAINÉ F. BELLIO, et al.,

Defendants.

X

The following papers were read on this application:

Notice of Motion for Summary Judgment and Order of Reference.....	1
Proposed Order.....	2
Notice of Cross-Motion.....	3
Affirmation in Opposition to Cross-Motion.....	4

Motion by plaintiff bank for summary judgment (CPLR §3212) and a reference to compute (RPAPL §1321) is denied. Defendants Loraine Bellio and Linda DeVito's cross-motion to dismiss for failure to name an indispensable party is granted and the complaint is hereby dismissed, without prejudice.

The note and mortgage was entered into in August of 1990. While executed by Patrick and Sonia LoPresti, it is conceded that Sonia LoPresti was the sole owner of the property. Mrs. LoPresti died in August 2005. Loraine Bellio and Linda DeVito subsequently were named co-executors of her estate. While named as defendants in their individual capacities as persons who might have or claim to have some interest in or lien upon "the mortgage property", they have not been named in their representative capacities. Counsel for plaintiff would treat such failure as mere oversight easily remedied by an amendment indicating the executors are being sued in their individual and representative capacities. The Court disagrees. The failure to name the executors in their representative capacity should be considered a fatal defect requiring dismissal of the complaint.

Plaintiff's motion also seeks a dismissal of defendants' counterclaim premised on the bank's failure to provide information with respect to the mortgage. While plaintiff's actions might evidence a disregard of what might be considered good business practices and the common courtesies one might expect from the banking industry, such actions do not give rise to the level of a cause of action or a defense to foreclosure. Accordingly, movant's counterclaim is dismissed.

This order concludes the within proceeding.

ENTER:

Dated: May 21, 2009
Mineola, NY



HON. EDWARD G. McCABE

Supreme Court Justice

ENTERED

MAY 29 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**