

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONTARIO

Wells Fargo Bank, N.A.,

INDEX NO. 124153-2019

Plaintiff(s),

v.

Carole Clark, as Administratrix CTA to the Estate of Elizabeth J. Davenport a/k/a Elizabeth Davenport; State of New York; New York State Department of Taxation and Finance; Wade Birnbaum,

**ATTORNEY
AFFIRMATION IN
SUPPORT OF PLAINTIFF'S
MOTION TO CONFIRM
REFEREE REPORT AND
FOR A JUDGMENT OF
FORECLOSURE AND SALE**

MORTGAGED PROPERTY:
4994 North Road
Canandaigua, NY 14424
COUNTY: Ontario
SBL #: Section 71.09 Block 2
Lot 6.00

Defendant(s).

Patrick Gregorits, pursuant to CPLR 2106 and under penalties of perjury, hereby affirms as follows:

1. I am an attorney at law and an associate of Shapiro, DiCaro & Barak, LLC, the attorneys of record for Plaintiff Wells Fargo Bank, N.A. I am fully familiar with the facts, court papers, and proceedings of this action based upon a review of the file maintained by my office.

2. This is a foreclosure action. The Plaintiff is moving the court to confirm the Referee's Report made in accordance with RPAPL §1321 and for a Judgment of Foreclosure and Sale pursuant to RPAPL §1351 that directs the distribution of the proceeds of sale in accordance with RPAPL §1354.

3. True and accurate copies of the following documents are attached hereto:

Document
Certificate of Merit
Note
Mortgage

Tab
Exhibit A
Exhibit B
Exhibit C

Assignments	Exhibit D
Notice of Default	Exhibit E
RPAPL §1304 90-Day Notice	Exhibit F
Department of Defense Search results	Exhibit G
Summons and Complaint	Exhibit H
Notice of Pendency	Exhibit I
Affidavits of Service	Exhibit J
Affidavit of Service by Mail pursuant to CPLR 3215(g)(3)(iii)	Exhibit K
Affidavit of Merit and Amount Due	Exhibit L
Affirmation of Regularity	Exhibit M
Order of Reference	Exhibit N
Notice of Entry of Order of Reference	Exhibit O
Referee's Oath and Report of Amount Due	Exhibit P
Attorney Fee Affirmation	Exhibit Q
Copy of death certificate and Letters	Exhibit R
Notices of Appearance, Answer or Notices of Return	Exhibit S

Legalback No. 2 - filed contemporaneously with this application
 Costs and Disbursements of Plaintiff with Supporting Invoices

Legalback No. 3 - filed contemporaneously with this application
 Proposed Judgment of Foreclosure and Sale

PROCEDURAL HISTORY

4. This residential mortgage foreclosure action was commenced by filing the summons and complaint in the Ontario County Clerk's Office on May 3, 2019, the County where the mortgaged property is located. The action was brought to foreclose a residential mortgage executed by Elizabeth J. Davenport, now deceased, as Mortgagor(s) to Wells Fargo Bank, N.A., as Mortgagee, to secure the sum of \$100,000.00, dated October 31, 2014 and recorded in the Ontario County Clerk's Office on November 5, 2014 at Liber 2581 of Mortgages, page 407.

5. On May 3, 2019, Plaintiff filed a notice of pendency in accordance with RPAPL §1331 and CPLR Article 65, a copy of which is attached hereto as **Exhibit "I"**. On July 9, 2019, Plaintiff re-filed the notice of pendency in accordance with RPAPL §1331 and CPLR Article 65.

6. The summons, complaint, and notice of pendency are in the form prescribed by statute and contain all of the particulars required by law. The summons complies with the

requirements of RPAPL §1320, contains the required notice in boldface type and is in the format required by statute.

7. On May 3, 2019, Plaintiff was Holder of the subject note. See Affidavit of Astra Love-Easter, attached hereto as **Exhibit "L"**.

8. The Certificate of Merit pursuant to CPLR 3012-b was filed with supporting documents and is attached hereto as **Exhibit "A"**.

9. According to the affidavit of service filed in the Ontario County Clerk's Office, the summons was served with the complaint. Defendant(s) were served with the notice required by RPAPL §1303 printed on colored paper together with the summons and complaint printed on white paper. The RPAPL §1303 notice complies with the requirements of that statute, with the title in bold, 20-point type and the text in bold, 14-point type. The RPAPL §1303 notice was delivered to the mortgagors on its own separate page, together with the summons and complaint. Defendant(s) were timely served with the 90-Day Pre-Foreclosure notice required by RPAPL §1304. Plaintiff filed the name, address and other pertinent information of the Defendant(s), the amount claimed to be due, and the type of loan at issue with the superintendent of banks within three business days of the mailing of the 90-day Pre-Foreclosure notice as required by RPAPL §1306. Copies of these notices and affidavits of service are attached hereto as **Exhibit "F" and Exhibit "J"**.

10. Plaintiff served defendants with copies of the summons in compliance with CPLR 3215(g)(3). The affidavit of service by mail pursuant to CPLR §3215(g)(3) is attached hereto as **Exhibit "K"**. Plaintiff served defendants with an additional copy of the summons in compliance with CPLR 3215(g)(3)(iii). Copies of the affidavits of service and mailing are attached hereto as **Exhibit "K" and Exhibit "J"**.

11. No defendant is an infant. No defendant is in the armed services of the United States of America. Upon information and belief, no defendant is incompetent.

12. Per this Court's Order of Reference, defendant(s), State of New York and New York State Department of Taxation and Finance and Wade Birnbaum were deemed to be in default.

13. The defendant(s)/mortgagor(s) is/are not resident(s) of the property subject to foreclosure. See affidavit of Dylan J. Frankel, attached hereto as **Exhibit "J"**.

14. On July 31, 2019, the Plaintiff moved for an Order of Reference. Plaintiff's motion was granted by the Court by Order dated September 11, 2019. A copy of the Order of Reference is attached hereto as **Exhibit "N"**.

15. Plaintiff mailed Notice of Entry of the Order of Reference to the defendant(s) or their attorney(s) on October 1, 2019 and filed the Notice of Entry with the Ontario County Clerk on October 1, 2019. A copy of the Notice of Entry is attached hereto as **Exhibit "O"**.

16. This court appointed Donna M. Cathy, Esq as Referee, to compute the amount due the Plaintiff and to examine and report whether the mortgaged property can be sold in parcels.

17. On October 22, 2019 and October 23, 2019, the Referee executed an Oath and Report of Amount Due which computed the amount due the Plaintiff to be \$92,103.51 as of July 19, 2019, and determined that the property should be sold as one parcel. The Referee's Oath and Report are attached hereto as **Exhibit "P"**. Plaintiff is entitled to interest at the note rate until the Judgment of Foreclosure and Sale is entered and at the statutory default rate thereafter.

18. No previous motion for a Judgment of Foreclosure and Sale has been made.

PLAINTIFF IS ENTITLED TO A JUDGMENT OF FORECLOSURE AND SALE

19. In conjunction with the motion for an Order of Reference previously granted by this Court, Plaintiff established all the required elements for a foreclosure. Plaintiff now requests that the property be sold pursuant to RPAPL §1351 and that the sale proceeds be distributed in accordance with RPAPL §1354.

20. RPAPL §1354(2) requires the Referee conducting the sale to pay out of the proceeds all taxes, assessments, and water rates that are liens upon the property and to redeem the property from any sales for unpaid taxes, assessments, or water rates that have not become absolute. At the time of sale, transfer tax is not a lien upon the property nor is it an expense of sale, as that term is used in RPAPL §1354(1). Rather, transfer tax is an expense of recording the deed. All expenses of recording the Referee's Deed, including real property transfer tax should be paid by the purchaser at the closing and not by the Referee from sale proceeds.

21. Plaintiff is entitled to a Judgment that includes reimbursement for Plaintiff's attorney fees for this action in accordance with the terms of the note and mortgage. A detailed affirmation regarding attorney fees is attached hereto as **Exhibit "Q"**.

22. Plaintiff is also entitled to a Judgment that includes reimbursement for Plaintiff's costs, allowances, and disbursements in this matter in accordance with the terms of the note and mortgage and CPLR Article 83. A detailed statement of Plaintiff's costs and disbursements with the supporting invoices was filed contemporaneously with this motion.

23. Copies of Notices of Appearance, Answer or Notices of Return are attached hereto as **Exhibit "S"**.

24. The Mortgagor, Elizabeth Davenport, died on July 13, 2017. By Letters dated August 11, 2017, Carole Clark was appointed as fiduciary of the Estate of Elizabeth Davenport. A copy of the Death Certificate and Letters are attached hereto as **Exhibit "R"**.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.