

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

479

CA 15-01793

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

GDH CONSTRUCTION INC., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

MARK A. GUGINO, LINDA M. GUGINO,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

FREID AND KLAWON, WILLIAMSVILLE (WAYNE I. FREID OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

BRAUTIGAM & BRAUTIGAM, LLP, FREDONIA (DARYL P. BRAUTIGAM OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County
(Deborah A. Chimes, J.), entered January 9, 2015. The order granted
the motion of defendants Mark A. Gugino and Linda M. Gugino for
summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed without costs.

Memorandum: In this mortgage foreclosure action, plaintiff
appeals from an order that granted the motion of Mark A. Gugino and
Linda M. Gugino (defendants) for summary judgment dismissing the
complaint. Plaintiff contends that defendants' motion should have
been denied as premature pursuant to CPLR 3212 (f) because further
discovery was necessary. We reject that contention. Because the note
and mortgage were a nullity "the discovery sought would [not] produce
evidence sufficient to defeat the motion" (*Resetarits Constr. Corp. v*
Elizabeth Pierce Olmstead, M.D. Center for the Visually Impaired
[appeal No. 2], 118 AD3d 1454, 1456). Plaintiff's contention that
defendants' motion should be denied on equitable grounds is raised for
the first time on appeal and thus is not properly before us (see
Ciesinski v Town of Aurora, 202 AD2d 984, 985).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court