

*Second Dept.*

**Mortgage Foreclosure/Affidavit of Service/Rebut Presumption/Hearing:** Bank foreclosed against borrower. Borrower defaulted but three months after the sale, borrower moved to vacate arguing lack of process. Bank's affidavit of service established that borrower was personally served. In response however, borrower filed an affidavit countering the physical attributes of the individual who was served. The Supreme Court, Dutchess County denied borrower's motion but the Second Dept. reversed stating that a hearing was necessary inasmuch as borrower's affidavit "set(ing) forth significant discrepancies between the age and weight of the person allegedly served and the appellant's actual age and weight at the time of the purported service (see *Kopman v Blue Ridge Ins. Co.*, 296 AD2d 479, 480)." *Emigrant Mtge. Co., Inc. v Westervelt*, Appellate Division, Second Department, 2013 NY Slip Op 02536.

Opinion

**Tenants by the Entirety/Mortgage Foreclosure/Conveyance by One Tenant:** Husband and wife owned property. Husband deeded out a 1/2 interest to a third party. Thereafter, wife and third party deeded their interests to another party, who executed a mortgage on the property and simultaneously transferred back a 99% interest to the husband and wife. The 1% owner defaulted and mortgagee foreclosed. Wife moved to dismiss arguing that the tenancy by the entirety was never terminated inasmuch as both husband and wife did not convey their interests together? The Supreme Court, Suffolk County denied and the Second Dept sustained reminding the defendant that one party to a tenancy by the entirety may convey its interest, thereby creating a tenancy in common between the remaining tenant and the new party subject however to the wife's taking the entire fee in the event that her husband pre-deceases her. The Court went on to state that in any case, here, both the husband and wife conveyed their interests thereby terminating the tenancy by the entirety. *Deutsche Bank Nation Trust Co. v Feliciano*, Appellate Division, Second Department, 2013 NY Slip Op 02531, April 17, 2013.

Opinion

**Mortgage Contingency/Good Faith/Down Payment:** Contract of Sale included a mortgage contingency clause. A rider further required purchaser to apply for a no-income-verification loan in the event that purchaser could not secure traditional financing. Purchaser was denied financing but failed to apply for the no income loan and thereafter, filed suit seeking to recover the down payment. Both parties moved for summary judgment and the Supreme Court, Kings County, ruled for purchaser. The Second Dept. sustained stating that although the purchaser is required to make a good faith effort to obtain financing, which would require compliance with the rider, here, the purchaser's failure to seek a no income loan was excused because purchaser produced evidence showing that its credit history would have prevented purchaser from securing any kind of financing. *Ettienne v Hochman*, Appellate Division, Second Department, NY Slip Op 02373, April 10, 2013, 2013.

Opinion