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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

KRISTINA DUPPS and MICHAEL OSTROWSKI,	TRIAL / IAS PART 29 NASSAU COUNTY
Plaintiff,	Index No. 151/12
- against -	Motion Sequence No. 001, 002
BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWABS INC. ASSET BACKED CERTIFICATES, SERIES 2006-26 (BNY MELLON NA),	
Defendant.	

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	1, 2
Answering Affidavits	3, 4
Replying Affidavits	5, 6
Briefs: Plaintiff's / Petitioner's	7
Defendant's / Respondent's	8, 9

The defendant moves, in motion sequence #1, pursuant to CPLR 3211(a)(5) to dismiss the plaintiffs' complaint, and to cancel the notice of pendency filed on January 31, 2012. The plaintiffs' claims relate to an August 6, 2008 judgment of foreclosure and sale where the defendant acquired title to the property by an October 21, 2008 referee's deed. The defendant commenced an summary holdover proceeding in Nassau County District Court which was resolved by a March 3, 2010 stipulation of settlement, including vacating the premises and waiving any right to seek further stay of eviction. The District Court denied the plaintiffs' subsequent motion to vacate the judgment of possession and warrant

of eviction, and the plaintiffs commenced the underlying plenary action.

The plaintiffs oppose this motion, and request the Court vacate the August 6, 2008 judgment of foreclosure and sale. The plaintiffs seek discovery from the defendants.

The plaintiffs move, in motion sequence #2, to vacate the August 6, 2008 judgment of foreclosure and sale. The plaintiffs question the proceedings and the standing of the defendant.

The defendant opposes the motion. The defense points to a March 8, 2011 court order dismissing the plaintiffs' claims against Countrywide Home Loans, Inc., and the order of the Appellate Division, 2d Department extending the plaintiffs' time to April 18, 2012 to file replacement appellate papers regarding the dismissal of the claims against the plaintiff. The defense also points at the March 3, 2010 stipulation of settlement where the plaintiffs agreed to vacate the premises by June 3, 2010, and the March 2, 2012 decision of the Appellate Term of the Supreme Court which found one of the plaintiffs defaulted in the holdover proceeding. The defense further points to the January 5, 2012 District Court order denying any further stay of the warrant of eviction, and the February 28, 2012 decision of the Appellate Term of the Supreme Court which denied any stay pending appeal of the that January 5, 2012 District Court order.

> A stipulation of settlement, which discontinues a claim with prejudice, is subject to the doctrine of res judicata (***see React Serv. v Rindos***, 243 AD2d 550 [1997]; ***Dolitsky's Dry Cleaners v Y L Jericho Dry Cleaners***, 203 AD2d 322 [1994]). Under the transactional approach to res judicata issues, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (***O'Brien v City of Syracuse***, 54 NY2d 353, 357 [1981]). Moreover, the doctrine of res judicata not only applies to the parties of record in the prior action, or administrative

> proceeding, but also to those in privity with them (***see Watts v Swiss Bank Corp.***, 27 NY2d 270 [1970]; ***Bay Shore Family Partners v Foundation of Jewish Philanthropies of Jewish Fedn. of Greater Fort Lauderdale***, 270 AD2d 374 [2000]; ***Matter of Home of Histadruth Ivrith v State of N.Y. Facilities Dev. Corp.***, 114 AD2d 200 [1986])

Matter of State of New York v Seaport Manor A.C.F., 19 A.D.3d 609, 610.

> "[A] valid final judgment bars future actions between the same parties on the 'same cause of action' (***see, e.g.***, 50 CJS, Judgments, § 598)" (***Matter of Reilly v Reid***, 45 NY2d 24, 27), whether the judgment was a primary claim or a counterclaim (***see, El Sawah v Penfield Mechanical Contrs. Corp.***, 119 AD2d 980). Under New York's transactional analysis approach to res judicata, "once a claim is brought to a final conclusion, all other claims ... are barred, even if based upon different [legal] theories or if seeking a different remedy" (***O'Brien v City of Syracuse***, 54 NY2d 353, 357; ***see, Boronow v Boronow***, 71 NY2d 284, 288; ***Feigen v Advance Capital Mgt. Corp.***, 146 AD2d 556, 558; ***Israel v Kaye Assocs.***, 145 AD2d 467, 468). Also, a judgment rendered with respect to a defense bars any counterclaims arising out of the same transaction or series of transactions (***see, Modell & Co. v Minister, Elders & Deacons of Ref. Prot. Dutch Church***, 68 NY2d 456, 461). In regard to issue preclusion or collateral estoppel, a party and those in privity with him are precluded from relitigating issues previously resolved against the party where the issue in the prior action is identical and where the party against whom the estoppel is sought has been afforded a full and fair opportunity to contest the decision (***see, Liss v Trans Auto Sys.***, 68 NY2d 15, 22; ***Gramatan Home Investors Corp. v Lopez***, 46 NY2d 481, 485; ***Richard L. v Armon***, 144 AD2d 1, 3). Furthermore, a judgment on consent is conclusive and has the same preclusive effect as a judgment after trial (***see, Prudential Lines v Firemen's Ins. Co.***, 91 AD2d 1). A default judgment is similarly conclusive for res judicata purposes (***see, Rizzo v Ippolito***, 137 AD2d 511, 513; 119 ***Rosset Corp. v Blimpy of N. Y. Corp.***, 65 AD2d 683)

Silverman v Leucadia, Inc., 156 A.D.2d 442, 443-444.

The Court determines the defendant meets its burden under CPLR 3211(a)(5) to dismiss the plaintiffs' complaint, and to cancel the notice of pendency filed on January 31, 2012. The plaintiffs' claims relate to the August 6, 2008 default judgment of foreclosure and sale where the defendant acquired title to the property by an October 21, 2008 referee's deed, and subsequent litigation for the possession interest (***see Silverman v. Leucadia, Inc.***, 156 A.D.2d, ***supra***). The Court finds the plaintiffs' claims were brought to a final

conclusion, and that final judgment is entitled to *res judicata* (***see State of New York v. Seaport Manor A.C.F.***, 19 A.D.3rd 609). In opposition to the defendant's application, the plaintiffs fail to proffer any proof otherwise.

> Pursuant to CPLR 3211 (a) (4), a court has broad discretion in determining whether an action should be dismissed on the ground that there is another action pending between the same parties for the same cause of action (***see Whitney v Whitney***, 57 NY2d 731, 732 [1982]; ***Matter of Janet L.***, 200 AD2d 801, 803 [1994]; ***Barringer v Zgoda***, 91 AD2d 811 [1982]; 6 Weinstein-Korn-Miller, NY Civ Prac ¶ 3211.18). A court may dismiss an action pursuant to CPLR 3211 (a) (4) where there is a substantial identity of the parties and causes of action (***see Montalvo v Air Dock Sys.***, 37 AD3d 567 [2007]; ***Certain Underwriters at Lloyd's, London v Hartford Acc. & Indem. Co.***, 16 AD3d 167 [2005]; ***Lopez v Shaughnessy***, 260 AD2d 551 [1999]; ***Proietto v Donohue***, 189 AD2d 807 [1993]). It is not necessary that the precise legal theories presented in the first action also be presented in the second action (***see Matter of Schaller v Vacco***, 241 AD2d 663 [1997]); rather, it is sufficient if the two actions are "sufficiently similar" (***Montalvo v Air Dock Sys.***, 37 AD3d at 567) and that the relief sought is "the same or substantially the same" (***Liebert v TIAA-CREF***, 34 AD3d 756, 757 [2006]; ***see White Light Prods. v On The Scene Prods.***, 231 AD2d 90 [1997]). The critical element is that " 'both suits arise out of the same subject matter or series of alleged wrongs' " (***White Light Prods. v On The Scene Prods.***, 231 AD2d at 94, ***quoting Kent Dev. Co. v Liccione***, 37 NY2d 899, 901 [1975]; ***see JC Mfg. v NPI Elec.***, 178 AD2d 505 [1991])

Cherico, Cherico & Assoc. v Midollo, 67 A.D.3d 622.

The defendant points out this action should be dismissed pursuant to CPLR 3211(a)(4) because the plaintiffs are prosecuting the same claim against it in another action presently on appeal with the Appellate Division, 2d Department. This Court determines there is another action pending between the same parties for the same cause of action. The Court finds the defendant meets its burden under CPLR 3211(a)(4) to dismiss the underlying action by showing there are issues raised and relief sought by the plaintiffs here which are substantially the same as the issues raised and relief sought in the pending action. In opposition, the plaintiffs fail to proffer any proof otherwise.

"A judgment of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties, and concludes all matters of defense which were or might have been litigated in the foreclosure action" (***Long Is. Sav. Bank v. Mihalios***, 269 A.D.2d 502, 503, 704 N.Y.S.2d 483)" (***Signature Bank v. Epstein***, 95 A.D.3d 1199). In an analogous matter, the Second Department held:

> The Supreme Court also properly denied those branches of the defendant's motion which were to vacate the judgment of foreclosure and sale pursuant to CPLR 5015(a)(1), since he failed to demonstrate a reasonable excuse for his default (***see Stephan B. Gleich & Assoc. v. Gritsipis***, 87 A.D.3d 216, 927 N.Y.S.2d 349), and pursuant to CPLR 5015(a)(3), since he failed to establish that the plaintiff procured the judgment of foreclosure and sale by fraud, misrepresentation, or other misconduct (***see Midfirst Bank v. Al–Rahman***, 81 A.D.3d 797, 917 N.Y.S.2d 871; ***Tribeca Lending Corp. v. Crawford***, 79 A.D.3d 1018, 916 N.Y.S.2d 116)

Wells Fargo Bank N.A. v. Hornes, 94 A.D.3d 755.

This Court determines the plaintiffs lack a reasonable excuse for their failure to timely appear and fail to show a meritorious defense regarding the judgment of foreclosure and sale (***see*** CPLR 5015).

Accordingly, the defense motion is granted, and the plaintiffs' motion is denied.

So ordered.

Dated: **June 22, 2012**

ENTER:

J. S. C.

FINAL DISPOSITION