

**JP Morgan Chase Bank, N.A. v Lupinacci**

2013 NY Slip Op 33625(U)

September 16, 2013

Supreme Court, Suffolk County

Docket Number: 22736-2009

Judge: C. Randall Hinrichs

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
IAS PART 49 - SUFFOLK COUNTY

**PRESENT:**

Hon. C. RANDALL HINRICHS  
Justice of the Supreme Court

MOTION DATE 3-28-2013  
ADJ. DATE 4-11-2013; 5-9-2013;  
6-6-2013  
Mot. Seq. # 003 MG  
          # 004 MD

-----X  
JP MORGAN CHASE BANK, NATIONAL  
ASSOCIATION

Plaintiff,

- against -

PALMERINO A. LUPINACCI; PATRICIA  
A. LUPINACCI; CLERK OF THE SUFFOLK  
COUNTY DISTRICT COURT;  
COMMISSIONER OF TAXATION AND  
FINANCE CIVIL ENFORCEMENT CO  
ATC; KEVIN BOLLAR; GAYLE BOLLAR  
HOMMEL;

Defendants.

FEIN, SUCH & CRANE, LLP  
Attorneys for Plaintiff  
747 Chestnut Ridge Road, Suite 200  
Chestnut Ridge, New York 10977-6216

I. LEONARD FEIGENBAUM, ESQ.  
Attorney for the Defendants  
Palmerino A. Lupinacci and  
Patricia A. Lupinacci  
1670 Old Country Road, Suite 224  
Plainview, New York 11803

**WE DO NEED TO ADD ALL THE  
OTHER D'S  
EVEN THOUGH THEY DID NOT  
ANSWER**  
Defendant Pro Se  
15 Burns Avenue  
Melville, New York 11747

-----X  
Upon the following papers numbered 1 to 15 read on this motion ~~to vacate an order of reference and issue a new order of reference~~; Notice of Motion/ ~~Order to Show Cause~~ and supporting papers 1 - 24; Notice of Cross-motion and supporting papers ~~to dismiss the complaint~~ 1-14; Answering Affidavits and supporting papers 1-13; Replying Affidavits and supporting papers 1-7; Other       ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion by plaintiff JP Morgan Chase Bank, National Association, for an order vacating the prior order of reference dated April 6, 2010, granting a new order of reference to appoint a referee to compute pursuant to RPAPL § 1321 and for leave to amend the caption of the action is granted; and it is further

**ORDERED** that the cross motion by defendants Palmerino A. Lupinacci and Patricia A. Lupinacci for an order dismissing the complaint pursuant to CPLR 3211 and/or CPLR 3215 is denied; and it is further

**ORDERED** that plaintiff shall serve a copy of this order upon the calendar clerk of this part, and it is further

**ORDERED** that plaintiff is directed to file a copy of this order with its proposed order of reference, signed contemporaneously herewith, upon the referee to compute and with its application for a judgment of foreclosure and sale.

This is an action to foreclose a mortgage on premises known as 35 Grafton Street, Greenlawn, Suffolk County, New York ("the property"). On August 19, 2004 defendants Palmerino A. Lupinacci and Patricia A. Lupinacci ("defendants") executed an adjustable rate note in favor of Washington Mutual Bank, FA ("WAMU") agreeing to repay the sum of \$260,000.00. At the same time defendants executed a first mortgage on the property securing that amount. The mortgage was recorded on October 15, 2004 in the Suffolk County Clerk's Office.

On September 25, 2008, as a result of a purchase and assumption agreement entered into between the Federal Deposit Insurance Corporation ("FDIC") as receiver of Washington Mutual Bank, formerly known as WAMU, and plaintiff JP Morgan Chase Bank, National Association ("plaintiff"), plaintiff became owner of the loans formerly owned by WAMU, including the mortgage and note executed by defendants. Plaintiff asserts that it is holder and owner of the subject mortgage and note at the time of commencement of this action by virtue of this purchase and assumption agreement.

Defendants failed to make their monthly payments pursuant to the terms of the mortgage and note as of February 1, 2009 and plaintiffs sent them a notice of default dated March 23, 2009. The default was not cured and the defendants remain in default. As plaintiffs did not reside at the property, service of a 90 day notice pursuant to RPAPL §1304 was not required. As a result of defendants continuing default, plaintiff filed a summons and complaint to foreclose, as well as a notice of pendency, with the Suffolk County Clerk on June 10, 2009. A successive notice of pendency was filed with the Suffolk County Clerk on January 14, 2013. From the submissions, plaintiff has met requirements of RPAPL §§ 1303 and 1320, has provided proof of service upon all parties and has served the additional notice of summons pursuant to CPLR 3215(g)(3). The courts records indicate that a settlement conference required by CPLR 3048 was held on March 11, 2010.

As to this motion, plaintiff has provided proof of service upon all defendants, an affidavit of merit executed by a vice president of plaintiff, an affirmation of counsel in support of this motion and an affirmation of counsel pursuant to the Administrative Orders of the Chief Administrative Judge of the Courts ("AO/558/10 and AO/431/11").

Defendants have never filed an answer in this action.

Plaintiff moved for an order of reference pursuant to RPAPL §1321 on August 7, 2009 and defendants did not submit opposition. The order was granted by the Justice Peter Fox Cohalan on April 6, 2010. Plaintiff submitted a motion for an order of judgement and sale returnable June 30, 2010 before Justice Cohalan. On June 28, 2010, defendants' counsel appeared in the action, entering into a stipulation with plaintiff's counsel, which among other things, adjourned plaintiff's motion. The stipulation was filed with the court. Defendants did not submit opposition to the motion, nor did they move to vacate either defendants' default in

answering or the order of reference, but by letter of October 4, 2010, plaintiff withdrew its application, which was memorialized by an order of Justice Cohalan dated December 6, 2010.

Upon the retirement of Justice Cohalan, this court was assigned the action. The court scheduled it for status conference on September 21, 2012 at which time plaintiff was directed to proceed with the action or file a discontinuance within 90 days. The court ordered that if plaintiff did not do so, the parties were to appear on January 4, 2013 and plaintiff would have to set forth a good faith basis for lack of compliance. No motions were submitted and on January 4, 2013 plaintiff and defendant appeared before the court. Plaintiff stated it was awaiting documents to file a motion and the court, over the objection of defendants' counsel, accepted that statement and adjourned for a further conference on February 13, 2013. At that conference, plaintiff stated it was preparing a motion but was advised by the court that if a motion was not filed by March 1, 2013 it would dismiss the action, and the case was adjourned to that date. On February 27, 2013 the court received the present motion by plaintiff, returnable March 28, 2013. The parties agreed to adjourn the motion to April 11, 2013 and notified the court.

Defendants filed an affirmation in opposition and a cross-motion to dismiss the complaint pursuant to CPLR 3211 and/or CPLR 3215, returnable April 11, 2013. Both motions were adjourned on consent to May 9, 2013 and submitted June 6, 2013, plaintiff submitting opposition to the cross motion and defendants replying thereto.

Addressing defendants' cross-motion, defendants arguments for dismissal of the complaint pursuant to CPLR 3211 and CPLR §3215 are without merit. Defendants argument for dismissal under CPLR 3211(c) that plaintiff has not established standing to bring the action, fails to recognize that standing is not the equivalent of subject matter jurisdiction and can be waived by failing to raise it in a timely answer or motion attacking the complaint. Here defendant has waived that issue, having failed to file an answer raising standing or move within the time to answer for dismissal on that ground (*Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239 [2d Dept 2007]). Even if the issue had been timely raised, plaintiff established standing by providing an affidavit of the FDIC receiver for Washington Bank Mutual showing plaintiff became the owner of all loans of WAMU as of September 25, 2008, and in addition, produced the mortgage and unpaid note which were in its possession at the time the action was commenced. Defendants' motion for dismissal pursuant to CPLR 3211 is denied.

Defendants also move to dismiss plaintiff's complaint for its failure to move for default within one year, citing CPLR §3215(c). Plaintiff originally timely moved for default by moving for an order of reference under RPAPL §1321 within two months of defendants failure to answer or move. Plaintiff's present motion to vacate that order and for a new order of reference was brought about by AO/ 548/10 and AO/431/11. To submit the affirmation now required for a judgment of foreclosure and sale, plaintiff had to review the papers and documents previously submitted in this action, as well as all other actions. That review caused plaintiff to question whether the affidavits originally submitted on the order of reference were properly verified and notarized. Unable to affirm the accuracy of those affidavits, it decided it was necessary to move to vacate the prior order and submit proper affidavits, resulting in this application to vacate and for a new order of reference. Plaintiff submitted an "Affirmation of Lateness" by its counsel explaining the reasons for the delay, and further addressed the issue in counsel's affirmation in support of this motion and affirmation in reply to the defendants' cross-motion. Plaintiff's counsel also explained the reasons for delay at three conferences before this court. The court

accepted those explanations, denying defendants' oral motion to dismiss, but advised defendant that a motion must be submitted by March 1, 2013 or the complaint would be dismissed. Plaintiff has followed the court's direction.

CPLR §3215 (c) allows a court to continue an action rather than dismissing it as abandoned if "sufficient cause is shown why the complaint should not be dismissed." The court finds that the explanations proffered by the plaintiff in its papers and at the court conferences are reasonable, provide sufficient cause why the case should not be dismissed, and, that from the submissions it appears to have a meritorious claim (*Giglio v. NTIMP, Inc.*, 86 A.D.3d 301 [2nd Dept 2011]). Defendants have not answered or moved to vacate their default and the court notes that they do not deny the debt, the mortgage or their continuing default.

Although not mentioned in defendants' notice of motion, they also argue that plaintiff has not submitted an adequate affidavit of merit pursuant to CPLR §3215(f) to warrant granting a default. The court has reviewed plaintiff's submissions, including the affidavit of merit submitted by a vice president of plaintiff, the complaint, and affirmations of counsel. Taken together, they are sufficient to enable the court to determine that a viable cause of action exists (*Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62 [2003]).

Based upon the foregoing, defendant's motion to dismiss the claim as abandoned under CPLR §3215(c) and its arguments that the affidavit of merit is insufficient pursuant to CPLR §3215(f), are denied.

Plaintiff's application to vacate the prior order of reference presents the court with an unusual situation where a plaintiff seeks to vacate an order in its favor. Courts have recognized the right of a successful party to set aside a judgment in its favor on grounds including mistake (*Commissioner of the State Insurance Fund v. ERA Contracting, Inc.*, 28 Misc.3d 1234(A) [Sup. Ct., Nassau Co. 2010] citing *Hatch v. Central Natl. Bank*, 78 N.Y. 478 [1879]) to re-plead to allege fraud (*Manufactures National Bank of Troy v. Soltys*, 49 Misc.2d 261 [Co. Ct., Montgomery Co. 1966]). Passage of CPLR 5015 did not divest the court of its inherent power of vacatur and it is not limited to the grounds set forth in CPLR 5015 (*McMahon v. City of New York*, 105 A.D.2d 101 [1st Dept. 1984]). Plaintiff's application appears based upon CPLR 5015(a)(5), as it fears the original documents and papers do not meet the standards required by AO/548/10 and AO/431/11. Based upon good cause shown, plaintiff's application to vacate the prior order is granted, but pursuant to CPLR 5015(a), upon the following terms the court finds just.

Pargraph 14 of the mortgage executed by defendants, entitled "Loan Charges," allows plaintiff to charge defendants "fees for services in connection with my default, ... including but not limited to, attorneys' fees...."

Defendant should not be charged plaintiff's legal fees generated as a result of reviewing the papers and documents submitted on the original motion, nor those legal fees for the prosecution of this application to vacate the original order brought to correct the apparent errors and improperly verified, executed and notarized documents and affidavit of merit. As a term and condition to the granting of its motion, plaintiff, or its successors, cannot charge the defendant the legal fees generated by such service. Any assessment for legal fees upon application for a judgement of foreclosure and sale must exclude such fees.

Upon vacatur, a new order of reference pursuant to RPAPL § 1321 is granted. A plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default (see *Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482 [2d Dept 2003]). Plaintiff has provided proof that defendants are in default; sufficient proof of merit of its claim; as well as compliance with RPAPL §§ 1303 and 1320; proof of service upon all parties, service of the summons and complaint and additional notice of summons pursuant to CPLR 3215(g)(3); an affidavit of non-military service; compliance with CPLR 3408 and the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); and an affidavit of service for the instant summary judgment motion. Based upon the foregoing, plaintiff's application for a default judgment as to the non-appearing, non-answering defendants and for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

Plaintiff's proposed order appointing a referee to compute is signed simultaneously herewith.

Plaintiff's request to amend the original caption to reflect the removal of all John Doe defendants is granted. As such was granted in the vacated order and used as the caption above, the caption shall remain as above.

Plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court.

Plaintiff is directed to file a copy of this order, along with the order of reference, upon the referee to compute and along with any application for a judgment of foreclosure and sale.

Dated: September 16, 2013

C. [Signature]  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION