

<b>Benjamin v Lasalle Bank N.A.</b>
2019 NY Slip Op 32579(U)
July 15, 2019
Supreme Court, Queens County
Docket Number: 715088/18
Judge: Robert I. Caloras
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**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. ROBERT I. CALORAS**

**PART 36**

**Justice**

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**DAVID BENJAMIN AND CHITTRA BENJAMIN,**

**Index No. 715088/18**

**Motion Date: 5/23/19**

**Plaintiffs,**

**Motion Cal. No. 4**

**Seq. No. 1**

**-against-**

**LASALLE BANK N.A., BANK OF AMERICA,  
N.A., U.S. BANK NATIONAL ASSOCIATION,  
AS TRUSTEE FOR MERRILL LYNCH FIRST  
FRANKLIN MORTGAGE LOAN TRUST,  
MORTGAGE LOAN ASSET-BACKED  
CERTIFICATES, SERIES 2007-5,**

**Defendants**

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The following papers numbered E7-E73 read on this motion by defendant U.S. Bank National Association, As Trustee for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-5 ("U.S. Bank"), for an order dismissing plaintiffs' Complaint against U.S. Bank with prejudice, pursuant to CPLR § 3211(a)(7); the cross-motion by the plaintiffs for an order: (a) denying the motion of defendant U.S. Bank National Association, as Trustee for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-5 ("U.S. Bank") to dismiss this action, (b) declaring, pursuant to CPLR § 320, that U.S. Bank has waived all objections to personal jurisdiction by filing a motion to dismiss that excluded lack of personal jurisdiction as a ground for dismissal, and (c) pursuant to CPLR § 3215, granting summary judgment in favor of plaintiffs David Benjamin and Chitra Benjamin as against Defendant LaSalle Bank, N.A. ("LaSalle") for failing to respond to the Amended Verified Complaint; and the cross motion by LaSalle dismissing plaintiffs' action in its entirety as against the LaSalle for improperly being sued herein as LaSalle Bank N.A.; or alternatively, permitting LaSalle to interpose a late Answer to the Amended Complaint pursuant to CPLR 3012(d) and CPLR 2004.

Notice of Motion-Affirmation-Exhibits.....  
Cross Motion (plaintiffs)-Affirmation in Opposition to  
U.S. Bank's Motion and in support of plaintiff's  
Cross-Motion -Exhibits.....  
Reply Affirmation (U.S. Bank) .....  
Cross-Motion (LaSalle)-Affirmation-Exhibits.....  
Reply Affirmation (plaintiffs)-Exhibits.....  
Affirmation in Opposition to LaSalle Cross-Motion  
and Reply Affirmation to Plaintiff's Cross-Motion)-

**PAPERS  
NUMBERED**

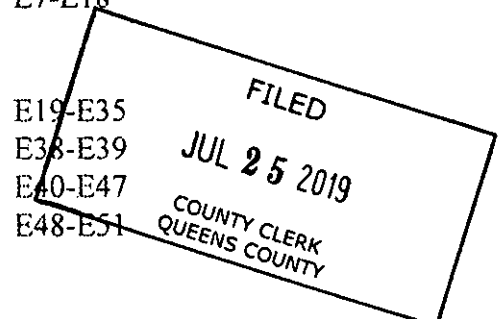
E7-E18

E19-E35

E36-E39

E40-E47

E48-E51



Exhibits.....	E52-E73
Stipulation of Adjournment.....	E36-E37

Upon the foregoing papers, it is ordered that defendant U.S. Bank’s motion, the plaintiffs’, David Benjamin and Chittra Benjamin (“Benjamins”), cross-motion, and LaSalle’s cross-motion are determined as follows:

The Benjamins commenced this action pursuant to RPAPL Article 15 to quiet title to the premises located at 111-51 113th Street, South Ozone Park, NY 11420 (the "Premises").

On or about January 8, 2009, LaSalle Bank N.A. (“LaSalle”) brought a foreclosure action against the Benjamins for an alleged default on the Mortgage the Benjamins executed against the Premises in the Supreme Court, Queens County, under the caption *LaSalle Bank National Association v David Benjamin and Chittra Benjamin et al.*, Index Number 443/2009 (the "Foreclosure Action"). In a memorandum decision, dated September 9, 2009 and entered on September 16, 2009, Justice Janice A. Taylor, granted LaSalle’s motion for summary judgment as against David Benjamin and directed LaSalle to "[s]ettle order". In a decision, dated December 10, 2015, Justice Taylor granted the Benjamins’ motion to reargue and/or renew the memorandum decision, dated September 9, 2009. Upon reargument, Justice Taylor deemed plaintiff’s prior motion abandoned and vacated the memorandum decision, dated September 9, 2009. Justice Taylor noted that it is “uncontested” that plaintiff’s failed to submit an order pursuant to the memorandum decision. Justice Taylor further noted that in the prior motion, plaintiff did not seek a default judgment as against Chittra Benjamin, and the time to so move expired on or about February 5, 2010. Consequently, Justice Taylor dismissed the action against Chittra Benjamin pursuant to CPLR 3215( c).

LaSalle appealed this decision, and the Second Department affirmed in a decision dated September 12, 2018 (*LaSalle Bank N.A. v Benjamin*, 164 AD3d 1223 [2d Dept. 2018]). In this decision, the Second Department noted that after the decision, entered on September 16, 2009 was issued, the Supreme Court stated, *inter alia*:

The court informed the plaintiff that a new attorney affirmation was required pursuant to new regulations set forth by the Office of Court Administration (hereinafter an OCA affirmation) before the court would sign an order granting summary judgment. The plaintiff did not file the required attorney affirmation, which consisted of two pages, until more than five years later. When the plaintiff finally did so, in February 2015, the plaintiff asserted that the substantial delay in its execution of the OCA affirmation was due to the "[p]laintiff's internal efforts to set forth a standard protocol with regard to execution of the client affidavits required prior to execution of the OCA Affirmation.

The Second Department also explained:

Contrary to [LaSalle's] argument, its notice to David that it was presenting the Supreme Court with a proposed order for settlement and signature did not satisfy the requirements of 22 NYCRR 202.48 (a), because that order was not accompanied by all the required papers. Nor did the plaintiff offer good cause for its substantial delay in submitting the required papers . . . Accordingly, we agree with the court's determination that, pursuant to 22 NYCRR 202.48, the plaintiff's motion for summary judgment was abandoned, thus warranting the vacatur of the decision entered September 16, 2009 . . . We also agree with the Supreme Court's determination, in effect, granting that branch of the motion of David and Chittra which was pursuant to CPLR 3215 to dismiss the complaint insofar as asserted against Chittra. Although the plaintiff sought summary judgment against David, it failed to take steps to enter a default judgment against Chittra within one year of her default (see CPLR 3215), without any reasonable excuse for its delay . . . Chittra, as a fee owner of the property which was subject to the mortgage, was a necessary and indispensable party to the action . . . Once the complaint was dismissed against Chittra, the plaintiff could not continue the action against the other defendants (see RPAPL 1311 [1]; CPLR 1001, 1003).

On October 3, 2018, the Benjamins filed the instant Complaint, alleging that the Appellate Court's September 12, 2018 decision "preclude[s] any further challenge to the property and to LaSalle Bank N.A.'s claim of title. Neither the defendants, nor any other entity can claim an interest in the property based on this mortgage". On December 5, 2018, defendant LaSalle filed its Answer. On December 18, 2018, the Benjamins filed an Amended Complaint, adding Bank of America, N.A. and U.S. Bank National Association, as Trustee for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-5 ("U.S. Bank") as defendants. The Benjamins alleged that on or about September 17, 2014, the Mortgage was purportedly assigned to U.S. Bank. The Benjamins further alleged that the Appellate Decision "preclude[s] any further challenge to defendants' claim of title to the Premises. Neither Defendants, nor any other entity can claim an interest in the property based on the Mortgage or any assignments of the Mortgage", and "[a]ny estate or interest in the Premises in which Defendants ever had, claim, or may claim, any and all liens or encumbrances in favor of Defendants... were extinguished by the decisions of the Appellate Division, Second Department.

U.S. Bank now moves for an order dismissing the Benjamins' Amended Complaint with prejudice, pursuant to CPLR § 3211(a)(7).

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), "[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). "The complaint must be liberally construed in the light most favorable to the plaintiff and all allegations must be accepted as true" (Podesta v Assumable Homes Dev. II Corp., 137 AD3d 767, 769 [2d Dept. 2016]).

As a general matter, an action to foreclose a mortgage is subject to a six-year statute of limitations (see CPLR 213 [4]; Yeshiva Chasdei Torah v Dell Equity, LLC, 90 AD3d 746 [2d Dept. 2011]; Wells Fargo Bank, N.A. v Eitani, 148 AD3d 193, 197 [2d Dept. 2017], lv denied 29 NY3d 1023 [2017]). However, CPLR 205 (a) provides, in pertinent part, that:

If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

"CPLR 205 (a) is a tolling provision, which 'serves the salutary purpose of preventing a Statute of Limitations from barring recovery where the action, at first timely commenced, had been dismissed due to a technical defect which can be remedied in a new action' " (Marrero v Nails, 114 AD3d 101, 108-109 [2d Dept. 2013], quoting United States Fid. & Guar. Co. v Smith Co., 46 NY2d 498, 505 [1979]).

Here, U.S. Bank argues that the 2015 Foreclosure Action was not dismissed for neglect of prosecution as against David Benjamin. U.S. Bank claims that the December 10, 2015 order does not set forth a "general pattern of delay", nor did it make reference to a "failure to prosecute". U.S. Bank argues that the singular delay in submitting an OCA affirmation in support of a long form order for summary judgment is "hardly a pattern". U.S. Bank also claims that the 2015 Foreclosure Action was dismissed as against plaintiff Chittra Benjamin merely for failure to obtain a default judgment against her within one year as required by CPLR §3215( c). U.S. Bank argues that a dismissal under CPLR 3215 is not due to a "failure to prosecute". Consequently, U.S. Bank argues that the dismissal is subject to the six month tolling provision of CPLR 205[a] as to both David and Chittra Benjamin.

In opposition, the Benjamins claim that the Foreclosure Action was dismissed for neglect to prosecute within the meaning of CPLR § 205(a), because in the decision, dated December 10, 2015, Justice Taylor set forth specific conduct by U.S. Bank's purported predecessor, LaSalle, which constitutes neglect and demonstrates a general pattern of delay in proceeding with the litigation. Specifically, Justice Taylor noted LaSalle's "failure to submit the required order" on its summary judgment motion against David Benjamin for over five years, and LaSalle's failure to "seek a default judgment against Chittra [Benjmain]" for over five years. Consequently, the Benjamins argue that U.S. Bank cannot rely on CPLR § 205 to save its claim, and the dismissal of the 2009 Foreclosure Action bars commencement of a new action on the Mortgage based on the expiration of the statute of limitations. Therefore, the Benjamins argue that they have alleged a valid claim to quiet title by removing the Mortgage as a cloud on title.

CPLR 205 (a) provides that: "Where a dismissal is one for neglect to prosecute the action made pursuant to [CPLR 3216] or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation" (see Marrero v Crystal Nails, supra). The "neglect to prosecute" exception in CPLR 205 (a) applies not only where the dismissal of the prior action is for "[w]ant of prosecution" pursuant to CPLR 3216, but whenever neglect to prosecute is in fact the basis for dismissal (Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. (Habiterra Assocs.), 5 NY3d 514, 520 [2005]). In its decision, the Second Department noted that LaSalle waited more than five years to submit a proposed order for settlement with the required affirmation pursuant to 22 NYCRR 202.48 (a). Since LaSalle failed to offer good cause for this "substantial delay", the Second Department determined that, pursuant to 22 NYCRR 202.48, LaSalle's motion for summary judgment was abandoned, and the memorandum decision entered on September 16, 2009 was vacated. Under these circumstances the Court finds that the Benjamins have sufficiently pleaded conduct constituting a neglect to prosecute and a general pattern of delay in the Foreclosure Action (Familio v Hersh, 150 AD3d 1203 [2d Dept. 2017]; Zulic v Persich, 106 AD3d 904 [2d Dept. 2013]). As such, U.S. Bank is not entitled to invoke the six-month savings provision set forth in CPLR 205. However, the Court finds that the Amended Complaint has not sufficiently stated a cause of action on behalf of Chittra Benjamin. The Second Department stated that Justice Taylor's decision, dated December 10, 2015, "[a]lthough the plaintiff sought summary judgment against David, it failed to take steps to enter a default judgment against Chittra within one year of her default (see CPLR 3215), without any reasonable excuse for its delay". Consequently, the Second Department affirmed Justice Taylor's decision, dated December 10, 2015, which dismissed the Foreclosure Action as against Chittra Benjamin pursuant to CPLR 3215. The Second Department and Justice Taylor did not otherwise "include any findings of specific conduct



demonstrating 'a general pattern of delay in proceeding with the litigation'" with respect to the dismissal of the Foreclosure Action as against Chittra Benjamin (U.S. Bank Trust, N.A. v Moomey-Stevens, 168 AD3d 1169 [3<sup>rd</sup> Dept. 2019], quoting Wells Fargo Bank, N.A. v Eitani, supra at 198, quoting CPLR 205 [a]; see Bank of N.Y. Mellon v Slavin, 156 AD3d 1073, 1073-1074 [3<sup>rd</sup> Dept. 2017]). As such, U.S. Bank is not precluded from utilizing CPLR 205 to commence a new action as against Chittra Benjamin. Accordingly, the Court denies the branch of the motion seeking to dismiss pursuant to CPLR 3211(a)(7) as against David Benjamin, and grants the motion as against Chittra Benjamin.

As to the cross-motion filed by the Benjamins, the Court finds that the first branch seeking to deny U.S. Bank's motion to dismiss pursuant to CPLR 3211(a)(7) is granted in part and denied in part as set forth above.

The second branch of the cross motion is determined as follows: The Benjamins request that the Court issue an order finding that U.S. Bank has waived all objections to personal jurisdiction by filing a motion to dismiss that excluded lack of personal jurisdiction as a ground for dismissal is granted as unopposed.

The third branch of the cross motion is determined as follows: The Benjamins request that the Court grant a default judgment as against defendant LaSalle for failing to respond to the Amended Complaint pursuant to CPLR 3215. The Benjamins claim that after LaSalle appeared by counsel, they served the Amended Verified Complaint on LaSalle electronically through counsel on December 18, 2018. The Benjamins argue that they are entitled to a default judgment against LaSalle because LaSalle has not answered or otherwise responded failed to the Amended Complaint.

RAS Boriskin LLC ("RAS"), filed a cross-motion on behalf of LaSalle seeking an order to dismiss plaintiff's action, or in the alternative, permitting LaSalle to interpose a late Answer to the Amended Complaint pursuant to CPLR 3012(d) and CPLR 200. RAS claims that LaSalle does not exist, as it was acquired by Bank of America on or about October 1, 2007. RAS claims that it was retained by Nationstar Mortgage LLC d/b/a Mr. Cooper, the servicer and attorney-in-fact. RAS claims that the Answer filed on December 5, 2018, was intended to state that it was being interposed on behalf U.S. Bank. However, RAS claims that, in error, the Answer indicated was interposed on behalf of LaSalle, which was the only defendant named in the action. On January 17, 2019, RAS claims that new counsel Sandelands Eyet LLP ("Sandelands") appeared in the action on behalf of U.S. Bank, by filing the pre-answer motion to dismiss. RAS claims that Sandelands did not appear in this action via a consent to change attorneys. As a result, RAS claims that it remains the attorneys of record for the defendant improperly sued herein as LaSalle, an entity that does not even exist. Moreover, RAS claims that the Amended Complaint, in essence, concedes that LaSalle does not have an interest in the Premises, as plaintiff names defendant's successor-in-interest as a separate defendant therein.

In opposition, the Benjamins argue that LaSalle should not be dismissed from this action because questions of fact exist regarding LaSalle's continued existence and interest in the Premises. The Benjamins argue that the assertions in RAS' affirmation are without merit because they were not corroborated by affidavits from persons with knowledge of the underlying facts or admissible documentation. The Benjamins claim that RAS failed to submit any documentation in support of RAS' claim that Mr. Cooper is a servicer or attorney-in-fact for U.S. Bank or has any other connection with this case. The Benjamins assert that RAS's claim that LaSalle ceased to exist on October, 1, 2007 contradicts the purported 2008 Assignment assigning the Mortgage to LaSalle in December 22, 2008. Moreover, the documents RAS has submitted do not indicate whether LaSalle was merged with Bank of America or acquired and operating as a wholly owned subsidiary.

The Court denies the branch of the Benjamins' cross motion seeking a default judgment against LaSalle, and grants the branch of LaSalles' cross motion seeking to dismiss the action. RAS stated that LaSalle no longer exists, and the record does not support a finding that the Benjamins have a viable cause of action against LaSalle. The remaining branches of LaSalle's cross motion are denied as academic.

Accordingly, U.S. Bank's motion, the Benjamins' cross motion and LaSalle's cross motion are granted in part and denied in part. As such, the complaint is dismissed as against LaSalle in its entirety, and plaintiff Chittra Benjamin's complaint is dismissed.

**Dated: July 15, 2019**



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**ROBERT I. CALORAS, J.S.C.**

