

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D14431
G/gts

_____AD3d_____

Argued - February 22, 2007

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
EDWARD D. CARNI
WILLIAM E. McCARTHY, JJ.

2005-08981

DECISION & ORDER

Associates Home Equity Services, Inc., etc., et al.,
respondents, v Regina Gambella, appellant,
et al., defendants.

(Index Nos. 8123/98)

John J. Budnick, Wantagh, N.Y., for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, White Plains, N.Y. (Bryon L. Friedman and Kathleen A. Daly of counsel), for respondents.

In an action to foreclose a mortgage, the defendant Regina Gambella appeals from an amended judgment of foreclosure and sale of the Supreme Court, Nassau County (Davis, J.), entered June 23, 2005, which, upon an order of the same court dated May 9, 2005, inter alia, added Option One Mortgage Corp. to the caption as a defendant and directed the referee to sell the mortgaged premises subject to the superior mortgage held by Option One Mortgage Corp.

ORDERED that the appeal from the amended judgment of foreclosure and sale is dismissed, with costs.

As a general rule, we do not consider an issue on a subsequent appeal which was raised or could have been raised in an earlier appeal which was dismissed for lack of prosecution (*see Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750; *Bray v Cox*, 38 NY2d 350). The defendant Regina Gambella appealed from the order dated May 9, 2005, which, inter alia, granted the motion of the defendant Option One Mortgage Corp. for leave to intervene as of right, but that appeal was dismissed by decision and order on motion of this court dated February 10, 2006, for failure to

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prosecute. We decline to exercise our discretion to determine the merits of the instant appeal, which raises the same issue as could have been raised on the appeal from the order which was dismissed for lack of prosecution (*see Gihon, LLC v 501 Second St., LLC*, 29 AD3d 630; *Hepner v New York City Tr. Auth.*, 27 AD3d 418, 419).

MASTRO, J.P., FLORIO, CARNI and McCARTHY, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court