

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

D25303
C/kmg

_____AD3d_____

Argued - November 12, 2009

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2008-09349
2009-02220

DECISION & ORDER

In the Matter of Southampton Brick and Tile, LLC,
appellant, v Suffolk County National Bank, respondent.

(Index No. 16798/08)

Lynn, Gartner & Dunne, LLP, Mineola, N.Y. (Kenneth L. Gartner and Robert P. Lynn, Jr., of counsel), for appellant.

Balfe & Holland, P.C., Melville, N.Y. (Amy J. Zamir and Ben Feder of counsel), for respondent.

In a proceeding, inter alia, pursuant to CPLR article 62, the petitioner appeals from (1) an order of the Supreme Court, Suffolk County (Whelan, J.), dated August 5, 2008, which, among other things, dismissed the proceeding on the ground that the petition failed to comply with CPLR 304, and (2) an order of the same court dated January 16, 2009, which denied its motion, inter alia, for leave to renew or reargue.

ORDERED that the order dated August 5, 2008, is reversed, on the law, the petition is reinstated, and the matter is remitted to the Supreme Court, Suffolk County, for a disposition of the petition on the merits following service of notice of the proceeding upon the debtors and the Sheriff in accordance with CPLR 3404; and it is further,

ORDERED that the appeal from the order dated January 16, 2009, is dismissed; and it is further,

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ORDERED that one bill of costs is awarded to the petitioner.

The appeal from so much of the order dated January 16, 2009, as denied that branch of the appellant's motion which was for leave to reargue must be dismissed, as no appeal lies from an order denying reargument. The appeal from the remainder of the order dated January 16, 2009, is dismissed as academic in light of our determination on the appeal from the order dated August 5, 2008.

Contrary to the Supreme Court's determination, the petitioner established that it properly commenced this proceeding by submitting a copy of the petition annexed to the order to show cause, which was date stamped by the Suffolk County Clerk on April 30, 2008 (*see* CPLR 304; *Matter of Alexy v Otte*, 58 AD3d 967, 968; *Matter of Correnti v Suffolk County Dist. Attorney's Off.*, 34 AD3d 578, 579-580). Accordingly, the Supreme Court should not have dismissed the proceeding for noncompliance with CPLR 304.

As the parties did not litigate the merits of the petition, the matter must be remitted to Supreme Court, Suffolk County, for that purpose.

Further, as it is undisputed that notice of this proceeding was not served upon the debtors and the Sheriff (*see* CPLR 6214[d]), the petitioner should cure the defect by serving them with notice of the proceeding (*see Banco Popular N. Am. v Philian Designs LLC*, 48 AD3d 368, 369).

In light of our determination, we need not reach the petitioner's remaining contentions.

MASTRO, J.P., FLORIO, BALKIN and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court