

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

D35613  
O/kmb

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Argued - June 11, 2012

MARK C. DILLON, J.P.  
ARIEL E. BELEN  
LEONARD B. AUSTIN  
SANDRA L. SGROI, JJ.

2010-11537  
2011-05308

DECISION & ORDER

Bank of New York, etc., appellant, v Sameeh Alderazi,  
et al., defendants.

(Index No. 21739/08)

Hiscock & Barclay, LLP, Buffalo, N.Y. (Charles C. Martorana of counsel), for  
appellant.

In an action to foreclose a mortgage, the plaintiff appeals from (1) an order of the Supreme Court, Kings County (Saitta, J.), dated April 19, 2010, which denied that branch of its ex parte motion which was pursuant to RPAPL 1321 for an order of reference, and (2) an order of the same court dated April 7, 2011, which denied its renewed motion pursuant to RPAPL 1321 for an order of reference and, sua sponte, directed dismissal of the complaint.

ORDERED that on the Court's own motion, the appeal from the order dated April 19, 2010, is dismissed, without costs or disbursements, as no appeal lies from the denial of an ex parte application (*see* CPLR 5704; *Voyticky v Gore*, 134 AD2d 354); and it is further,

ORDERED that on the Court's own motion, the notice of appeal from so much of the order dated April 7, 2011, as, sua sponte, directed dismissal of the complaint, is deemed an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order dated April 7, 2011, is reversed, on the law and in the exercise of discretion, and the plaintiff's renewed motion pursuant to RPAPL 1321 for an order of reference is granted, without costs or disbursements.

October 17, 2012

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The Supreme Court improvidently exercised its discretion in denying the plaintiff's renewed motion pursuant to RPAPL 1321 for an order of reference. The defendants failed to answer the complaint within the time allowed, and the plaintiff submitted, in support of its renewed motion, the mortgage, the note, the verified complaint setting forth the facts establishing the claim, and evidence of the mortgagor's default (*see Emigrant Mtge. Co., Inc. v Fisher*, 90 AD3d 823, 824; RPAPL 1321). Under these circumstances, the Supreme Court should have granted the plaintiff's renewed motion for an order of reference.

The Supreme Court improvidently exercised its discretion in, sua sponte, directing the dismissal of the complaint. Since the defendants failed to answer the complaint and did not make pre-answer motions to dismiss the complaint, they waived the defense of lack of standing (*see CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 761). Moreover, a party's lack of standing does not constitute a jurisdictional defect and does not warrant a sua sponte dismissal of the complaint by the court (*see U.S. Bank N.A. v Emmanuel*, 83 AD3d 1047, 1048-1049).

DILLON, J.P., BELEN, AUSTIN and SGROI, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court