

**Caliber Home Loans, Inc. v Silber**

2024 NY Slip Op 31556(U)

March 21, 2024

Supreme Court, Nassau County

Docket Number: Index No. 003469/14

Judge: Erica L. Prager

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

PRESENT: ERICA L. PRAGER, J.S.C.

-----X  
CALIBER HOME LOANS, INC. F/K/A VERICREST  
FINANCIAL, INC.

Plaintiff,

IAS/TRIAL PART 17

Motion Seq.: 002, 003  
Submission Date: 1/8/24

-against-

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DAVID W. SILBER A/K/A DAVID W. SILBER, ESQ.,  
PATRICIA A. FOUR-SILBER A/K/A PATRICIA SILBER  
A/K/A PATTIE SILBER, JPMORGAN CHASE BANK,  
THE CLENGARIFF CORPORATION, MIDLAND  
FUNDING, LLC DBA IN NEW YORK AS MIDLAND  
FUNDING OF DELAWARE, LLC, DYLAN SILBER,  
SAGE SILBER, JOE SIGNOFELLI,

DECISION AND ORDER

Defendants.

-----X

NYSCEF Doc. No.

Motion Sequence 002

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Motion Sequence 003

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Motion by the plaintiff for an Order, pursuant to CPLR § 306-b, extending the time in which to serve the Summons and Complaint upon defendant David W. Silber a/k/a David Silber (*Seq. No. 002*). Cross motion by defendants Patricia A. Four-Silber a/k/a Patricia Silber, individually and as legal guardian for David W. Silber, for an Order dismissing the instant action in its entirety (*Seq. No. 003*). The parties submit respective opposition and reply affirmations.

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The plaintiff initiated the instant action sounding in mortgage foreclosure in 2014. In 2016, the defendants moved, by way of Order to Show Cause, to stay a foreclosure sale due to improper service upon Mr. Silber. This motion was denied, but the defendants were successful on appeal, and the matter was remanded for a traverse hearing.

CPLR § 306-b provides that service of a summons and complaint shall be made within one hundred twenty days after the commencement of an action, but adds that "[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service." "[G]ood cause may be found to exist where the plaintiff's failure to timely serve process is a result of circumstances beyond the plaintiff's control" (*State of New York Mtge. Agency v. Braun*, 182 AD3d 63 [2d Dept 2020], quoting *Bumpus v. New York City Tr. Auth.*, 66 AD3d 26 [2d Dept 2009]). "[I]n determining whether to grant an extension of time to serve defendant under the 'interest of justice' standard, the Court should consider all of the relevant factors including, but not limited to, 'diligence, or lack thereof, ... the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to the defendant'" (*Chase Home Fin., LLC v. Berger*, 110 NYS3d 223 [Sup Ct, Rockland County 2018], quoting *Leader v. Maroney*, 97 NY2d 95 [2001]).

The instant motion by the plaintiff was made "in the event the Court sustains the traverse." The plaintiff alleges that the defendants "actively concealed from plaintiff and its process server that David was incapacitated and that Patricia was appointed his co-guardian." The plaintiff additionally argues that it "had no reason to believe there was any dispute about the service of process in this case." However, the plaintiff attaches an affidavit by Ms. Silber wherein she detailed the dispute about the service of process in this case in 2016. Plaintiff did not move for an extension of time to serve in 2016, waiting instead for over seven years, until the eve of the traverse hearing after the subject appeal was determined.

Moreover, the subject traverse hearing was completed, and by Order dated August 15, 2023, it was determined that service was not effected on defendant David W. Silber. This Order directed that the Judgment of Foreclosure and Sale in this action was vacated and the plaintiff's Complaint was dismissed insofar as asserted against Mr. Silber.

Here, the plaintiff failed to make the requisite showing for an extension of time to serve (see CPLR § 306-b). The plaintiff provided evidence that they were made aware of the dispute over service in 2016, and offers no explanation for its lack of diligence and extraordinary delay in seeking

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the instant relief. Accordingly, there has been no showing of good cause or that an extension would be in the interest of justice (see *Bumpus*, supra; see also *Leader*, supra). Further, as the action has been dismissed as against Mr. Silber as a result of the traverse hearing, undue prejudice would result from granting the plaintiff an extension (see *Chase Home Fin., LLC*, supra).

As to defendants' cross-motion to dismiss the action as against Patricia A. Four-Silber and the remaining defendants, defendants have demonstrated entitlement to such relief pursuant to CPLR §§ 306-b, 308 (2), 1001, 1003, 1203, 3211 (a) (8), 5015 (a) (4), and RPAPL §1311 (1). See *LaSalle Bank Nat'l Ass'n v. Benjamin*, 164 A.D.3d 1223, 1225 (2d Dept. 2018) (holding that a fee owner of the property which was subject to the mortgage, was a necessary and indispensable party to the action, and that once the complaint was dismissed against the fee owner, the plaintiff could not continue the action against the other defendants).

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein. Based upon the foregoing, it is hereby

**ORDERED**, that the plaintiff's motion for an Order extending the time in which to serve the Summons and Complaint upon defendant David W. Silber a/k/a David Silber (*Seq. No. 002*) is *denied*, and it is further

**ORDERED**, that the cross motion by defendants Patricia A. Four-Silber a/k/a Patricia Silber, individually and as legal guardian for David W. Silber, for an Order dismissing the instant action in its entirety (*Seq. No. 003*) is *granted*.

This shall constitute the Decision and Order of the Court.

Dated: March 21, 2024  
Mineola, NY, 11501

ENTER:

  
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HON. ERICA L. PRAGER, J.S.C.

**ENTERED**

**Apr 01 2024**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE