HSBC Mortgage Corp. v Oberlander
2002 NY Slip Op 30103(U)
June 13, 2002
Supreme Court, Kings County
Docket Number: 10636/02
Judge: Melvin S. Barasch
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At an IAS Term, Part **26** of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, **at** Civic Center, Brooklyn, New York, on the **13"** day of June, **2002**

P R E **S** E N T:

HON. MELVIN **S.** BARASCH,
Justice.

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HSBC MORTGAGE CORP., F/K/A
MARINE MIDLAND MORTGAGE
CORPORATION,

Index No. **10636/02**

Plaintiffs,

- against -

DAVID OBERLANDER,

Defendant.

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The following papers numbered 1 to 6 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	**1-2 , 3-4**
Opposing Affidavits (Affirmations)	**5**
Reply Affidavits (Affirmations)	**6**
_____ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff HSBC Mortgage Corp. moves for an order, pursuant to CPLR **3212,** granting summary judgment on its complaint, striking the answer of defendant David Oberlander, and granting plaintiff a declaratory judgment against

defendant David Oberlander, and granting plaintiff a declaratory judgment against defendant with respect to title to the subject premises. Defendant cross-moves for an order, pursuant to CPLR 3025, granting leave to serve an amended answer and, pursuant to CPLR 3212, granting summary judgment dismissing the complaint.

Plaintiff brought this action pursuant to article 15 of the RPAPL for a declaratory judgmeni barring defendant from claiming any right, title or interest in and to the subject premises at 36 Taylor Street, Unit 181, in Brooklyn. The unit was formerly owned by Zissy Mittleman, who executed a mortgage thereon to secure a loan in the amount of $134,700.00. The mor:gage and note were assigned to plaintiff on February 26, 1992. Ms. Mittlemen subsequently defaulted on the mortgage and foreclosure proceedings were commenced on March 30, 1993. In conjunction with the foreclosure action, a notice of pendency was filed on April 2,1993. In the meantime, on January 5,1993, Ms. Mittleman deeded the property to defendant, which deed was recorded on May 3,1993. Plaintiff thereafter joined defendant in the foreclosure proceedings.

The initial notice of **pendency** expired by operation of law on **April** 1,1996. Plaintiff filed a successive notice of pendency on September 30, 1996. On October 13, 1998, a judgment of foreclosure and sale was issued. **A** foreclosure sale was held on June 6,2000 at which Samuel Schwartz was the successful bidder. Transfer of the deed was held in abeyance pending determination of an August 16,2000 order to show cause by defendant challenging service of the summons and complaint. The order to show cause was resolved

by stipulation whereby the foreclosure action would be discontinued as to defendant and that the judgment of foreclosure and sale "shall not be binding on defendant Oberlander as if he was never made a party defendant to the action." Plaintiff thereafter commenced a separate action against defendant to quiet title to the premises.

The court will first address defendant's cross-motion to serve an amended answer and dismiss the complaint. In his amended answer, defendant interposed a fourth affirmative defense that the underlying judgment of foreclosure is invalid since the first notice of pendency, a pre-requisite to obtaining a judgment of foreclosure, had expired by operation of law and may not be renewed under the holding of a recent Court of Appeals decision. Defendant further interposes a counterclaim pursuant to article 15 of the RPAPL cancelling the mortgage and adjudging that the premises is unencumbered thereby.

It is well settled that leave to amend pleadings should be freely given in the absence of significant prejudice to the other side (see CPLR 3025[b]; *Edenwald Contr.* Co. *v City of New York,* 60 NY2d 957,959; *Scheuerman* v *Health & Hosps. Corp. of City of New York,* 243 AD2d 553,554). As plaintiff was clearly aware that the notice of pendency filed in the foreclosure action had expired, there can be no claim of prejudice *(see Hunt* v *Godesky*, 189 AD2d 854). As a result, the branch of defendant's cross motion for leave to serve an amended answer is granted.

CPLR 6513 provides:

> A notice of pendency shall be effective for a period of three years from the date of filing. Before expiration of a period

> of a period or extended period, the court, upon motion of the plaintiff and upon such notice as it may require, for gdod cause shown, may grant an extension for a like additional period. An extension order shall be filed, recorded and indexed before expiration of the prior period.

RPAPL § 1331 provides:

> The plaintiff, at least twenty. days before a final judgment directing a sale is rendered, shall file in the clerk's office of each county where the mortgaged property is situated a notice of the pendency of the action, which shall specify, in addition to other particulars required by law, the date of the mortgage, the parties thereto and the time and place of recording.

The requirement that, in a foreclosure action brought pursuant to RPAPL article 13, a notice of pende icy be filed at least 20 days before entry of final judgment is, in effect, an element of plaintiff's cause of action, and failure to comply with the filing requirement precludes entry of final judgment ***(see Slutsky v Blooming Grove Inn,*** 147 AD2d 208,212-213).

In the case of ***Robbins v Goldstein*** (36 AD2d 730), the Appellate Division, Second Department stated:

> "**In our opinion,** the previous cancellation of the original lis pendens filed by plaintiff. . . did not make it impossible for him to meet the requirement of section 1331 of the Real Property Actions and Proceedings Law that in an action to foreclose a real property mortgage a lis pendens must be filed at least 20 days before final judgment of foreclosure and sale is rendered. Despite that cancellation, plaintiff can comply with section 1331 by timely filing a new lis pendens containing the details required by that section. . . ***Israelson v Bradley*** (308 NY 511), *Lanzoff v* ***Bader*** (13 AD2d 995) and ***Cohen v*** *Ratkowsky* (43 App. Div. 196), which held that a second lis pendens may not be filed after the original one has been canceled, are

> distinguishable and not here controlling, since (a) they were not mortgage foreclosure actions (in which the filing of a lis pendens is an essential prerequisite to the entry of final judgment), but other types of actions in which a lis pendens is merely an added special privilege, so that its filing or nonfiling does not affect the cause of action, and (b) the clear intent of those decisions (expressed in *Israelson, supra,* and the analogous case of *Cohen* v *Biber,* 123 App Div 528) was not to destroy the cause of action by forbidding the filing of a successive lis pendens, but merely to restrict the added special privilege granted to the plaintiff by CPLR 6501 and its predecessor statutes.

This holtling was reiterated by the Appellate Division, Second Department in subsequent cases (*Wasserman* v *Harriman,* 234 AD2d 596; *Slutsky,* 147 AD2d 208).

However, in *Matter of Sakow* (97 NY2d 436), the Court of Appeals made it settled law that CPLR 6513 does not permit a plaintiff to file a notice of pendency after a previously filed notice of pendency concerning the same causes of action or claims has expired without timely renewal. In *Campbell* v *Smith* (297 AD2d 502), the Appellate Division, First Department, relying on *Matter of Sakow,* held that dismissal of a foreclosure action is mandated where the notice of pendency had been allowed to expire.

Since the abovementioned Appellate Division, Second Department cases which permit successive filing of notices of pendency in foreclosure cases were decided prior to *Matter of Sakow,* these cases are no longer persuasive authority. In such an instance, this court is constrained to follow the holding of the Appellate Division, First Department in *Campbell* v *Smith (see Mountain View Coach Lines, Inc. v Storms,* 102 AD2d 663). Accordingly, the

second notice of pendency is a nullity and the underlying judgment of foreclosure upon which plaintiff's action is grounded is invalid. As a result, defendant's cross motion to dismiss the complaint is granted. In light of this determination, plaintiffs motion for summary judgment is denied as academic.

The foregoing constitutes the decision and order of the court.

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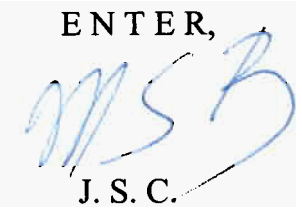

J. S. C.

MELVIN S. BARASCH