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| <b>US Bank Natl. Assn. v Perez</b>                                                                                                                                                                                               |
| 2012 NY Slip Op 31812(U)                                                                                                                                                                                                         |
| July 10, 2012                                                                                                                                                                                                                    |
| Supreme Court, Queens County                                                                                                                                                                                                     |
| Docket Number: 32123/09                                                                                                                                                                                                          |
| Judge: Robert J. McDonald                                                                                                                                                                                                        |
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SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. ROBERT J. McDONALD  
Justice

IAS PART 34

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US BANK NATIONAL ASSOCIATON, AS  
TRUSTEE FOR STARM 2007-3  
3476 Stateview Boulevard  
Ft. Mill, SC 29715

Index No.: 32123/09

Motion Date: 3/29/12

Motion No.: 38

Motion Seq.: 2

Plaintiff,

- against -

MARIANELA PEREZ, INDIVIDUALLY AND AS  
SURVIVING SPOUSE OF GERARDO  
MASTANUONO, CAPITAL ONE BANK, MIDLAND  
FUNDING LLC, NEW YORK CITY CRIMINAL  
COURT, NEW YORK CITY DEPARTMENT OF  
FINANCE, NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD, NEW YORK CITY PARKING  
VIOLATIONS BUREAU, NEW YORK CITY  
TRANSIT ADJUDICATION BUREAU, NEW YORK  
STATE DEPARTMENT OF TAXATION AND  
FINANCE, NORTH FORK BANK, PORTFOLIO  
RECOVERY ASSOCIATES, LLC, UNITED  
STATES OF AMERICA ACTING THROUGH THE  
IRS, WELLS FARGO BANK, N.A., MRS.  
PEREZ,

(John Doe, said name being fictitious,  
it being the intention of plaintiff to  
designate any and all occupants fo  
premises being foreclosed herein, and  
any parties, corporations or entities,  
if any, having or claiming an interest  
or lien upon the mortgaged premises.)

Defendants.

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The following papers numbered 1 to 19 read on this motion by  
plaintiff pursuant to CPLR 5019(a) and CPLR 2001 to substitute  
the affidavit of merit and amount due, nunc pro tunc, in place of  
the affidavit originally attached to the application for an order

of reference, to "validate" the order of reference, for leave to enter a default judgment of foreclosure and sale, to amend the affirmation of regularity, the notice of pendency, and order of reference dated September 16, 2010 , nunc pro tunc, to reflect the correct date of the assignment of the mortgage; and this cross motion by defendant Marinela Perez to dismiss the action as asserted against her pursuant to CPLR 3215(c) as abandoned, or in the alternative, to vacate the order of reference.

Papers  
Numbered

|                                                |       |
|------------------------------------------------|-------|
| Notice of Motion - Affidavits - Exhibits       | 1-10  |
| Notice of Cross Motion - Affidavits - Exhibits | 11-14 |
| Answering Affidavits - Exhibits                | 5-17  |
| Reply Affidavits                               | 18-19 |

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action for foreclosure by filing a copy of the summons and complaint and a notice of pendency on December 1, 2009. Defendant Perez failed to appear or interpose an answer, and plaintiff moved ex parte pursuant to RPAPL 1321 for an order of reference appointing a referee to compute the sums owing it, and to examine and report whether the mortgaged premises known as 82-58 89<sup>th</sup> Street, Glendale, New York can be sold in parcels. In support of the application, plaintiff submitted an affidavit of merit and amount due dated January 10, 2010, executed by one "Herman John Kennedy" (Kennedy affidavit), in which the affiant attested to being a vice president of loan documentation at Wells Fargo Bank, N.A. (Wells Fargo), the servicer of the mortgage loan, and set forth the basis of plaintiff's claims and the amounts due and owing by defendant Perez. The ex-parte application was also supported by an affirmation of regularity dated September 1, 2010 by Jacob W. Osher (the Osher affirmation). By order dated September 16, 2010, the referee was appointed. The referee executed his oath and issued his report dated June 21, 2011, indicating plaintiff was due the sum of \$423,670.74 as of June 13, 2011, and that mortgaged premises should be sold in one parcel.

Plaintiff moves pursuant to CPLR 5019(a) and CPLR 2001 to substitute nunc pro tunc an affidavit of merit dated April 30, 2011 of Pat K. Anderson, the "VP of Loan Documentation" of Wells Fargo (the Anderson affidavit) in place and stead of the Kennedy

affidavit, "validate" the order of reference, for leave to enter a default judgment of foreclosure and sale, and for leave to amend the Osher affirmation, the notice of pendency and the order of reference, nunc pro tunc, to reflect that the correct date of the assignment of the mortgage was October 29, 2009 and not November 6, 2009.

Defendant Perez opposes the motion and cross moves to dismiss the action insofar as asserted against her on the ground that plaintiff had not entered a judgment within one year of her default in answering, or alternatively, to vacate the order of reference for failure to comply with the Administrative Order 548/10. Defendant Perez does not seek to vacate her default in answering or for leave to serve a late answer.

Plaintiff opposes the cross motion.

It is undisputed that defendant Perez defaulted in answering the complaint, and that plaintiff failed to move for leave to enter a default judgment against her within one year after the default in January 2010.

"When a plaintiff fails to seek leave to enter a default judgment within one year after the default has occurred, the action is deemed abandoned" (*Solano v Castro*, 72 AD3d 932 [2010]; also see *Cynan Sheetmetal Prods., Inc. v B.R. Fries & Assoc., Inc.*, 83 AD3d 645 [2011]; *Butindaro v Grinberg*, 57 AD3d 932 [2008]; *County of Nassau v Chmela*, 45 AD3d 722 [2007]). To avoid mandatory dismissal of the complaint pursuant to CPLR 3215(c), the plaintiff is required to demonstrate both a reasonable excuse for the delay in seeking a default judgment and that the complaint is meritorious (see *Ryant v Bullock*, 77 AD3d 811 [2010]; *Solano v Castro*, 72 AD3d 932 [2010], *supra*).

Here, plaintiff filed a request for judicial intervention on May 11, 2010 seeking a residential foreclosure conference (pursuant to CPLR 3408), on the ground the property was residential and improved with a one-to-four family, owner-occupied dwelling. Counsel for plaintiff attended the scheduled conference on August 3, 2010, and by order of the same date, the Court Attorney Referee released the case from the Residential Foreclosure Part, noting that defendant Perez had failed to appear, and directed the case proceed by order of reference or motion. Plaintiff thereafter sought the order of reference, which was granted on September 16, 2010.

On October 20, 2010, an administrative order (Administrative Order 548/10) was issued by the Chief Administrative Judge of the

Courts, which required a plaintiff's attorney in a residential mortgage foreclosure action to file with the court an affirmation confirming the accuracy of the plaintiff's pleadings.<sup>1</sup> The Administrative Order 548/10 was implemented to protect the integrity of the foreclosure process, insofar as there had been widespread instances of deficiencies in notarization and robo-signing of supporting documents in mortgage foreclosure proceedings in which bank employees signed foreclosure documents and vouched for their accuracy without personally reviewing them to verify the contents. In cases pending on the effective date of the Administrative Order 548/10, where no judgment of foreclosure had been entered, the attorney affirmation was required to be filed at the time of filing of either the proposed order of reference or judgment of foreclosure and sale (see Administrative Order 548/10, replaced by Administrative Order 431/11) (see *US Bank, NA v Boyce*, 93 AD3d 782 [2012]).

Plaintiff contends that as a consequence of the Administrative Order, foreclosure proceedings came to a halt while lenders set up procedures with their counsel to review files and comply with the new requirement. Plaintiff admittedly informed its counsel that "there may have been irregularities with regard to the execution" of the Kennedy affidavit. Consequently, plaintiff obtained the Anderson affidavit for the purpose of demonstrating the merits of its claims and defendant Perez's default under the mortgage and note. In support of the motion, plaintiff has submitted, among other things, the Anderson affidavit, a copy of the summons and complaint, an affirmation of its counsel dated July 11, 2011, a copy of the mortgage, note and assignment agreement, and a separate affirmation of counsel dated July 11, 2011 pursuant to Administrative Order 431/11.

Under these circumstances, plaintiff has not abandoned the action and sufficient cause exists as to why it did not move for default judgment within one year from January 2010.

In addition, plaintiff has offered evidence that it was the holder of the note and mortgage at the time of the commencement of the action (*cf. Bank of New York v Silverberg*, 86 AD3d 274 [2011]), and defendant Perez defaulted in payment under the mortgage and note. Thus, plaintiff has shown that its claim is potentially meritorious (see *Ryant v Bullock*, 77 AD3d 811 [2010], *supra*). Plaintiff has made a sufficient showing to avoid

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Administrative Order 548/10 has since been replaced by Administrative Order 431/11.

dismissal of the complaint asserted against defendant Perez as abandoned (see CPLR 3215[c]). That branch of the cross motion to dismiss the complaint as against defendant Perez pursuant to CPLR 3215(c) is denied.

Plaintiff moves to substitute the Kennedy affidavit with the Anderson affidavit nunc pro tunc, asserting that the Anderson affidavit will serve to correct an irregularity which does not affect a substantial right of the parties, and for leave to amend the Osher affirmation and the notice of pendency. It seeks to make the substitution and the amendment so that its counsel may affirm, pursuant to Administrative Order 431/11, that he has communicated with Pat K. Anderson, as a representative of plaintiff, and that Anderson confirmed the factual accuracy of the allegations set forth in the complaint and any supporting affidavits and affirmations filed with the court, as well as the accuracy of the notarizations contained in the supporting documents filed therewith, including the supporting affidavit (now substituted) filed with the court in connection with the application for the order of reference. Plaintiff asserts that the claims and amounts set forth in the Kennedy affidavit were true and accurate, and are repeated in the Anderson affidavit.

Plaintiff makes no alternative request for leave to vacate the order of reference, and upon vacatur, to obtain a new order of reference based, in part, upon the Anderson affidavit.

CPLR 5019 (a) provides a court with discretion to cure mistakes, defects, and irregularities in judgments or orders regarding ministerial matters which do not affect the substantial rights of the parties (see *Kiker v Nassau County*, 85 NY2d 879 [1995]; *Mount Sinai Hosp. v Country Wide Ins. Co.*, 81 AD3d 700 [2011]; *Rotunno v Gruhill Constr. Corp.*, 29 AD3d 772 [2006]; *Haggerty v Market Basket Enters., Inc.*, 8 AD3d 618, 619 [2004]). Likewise, CPLR 2001 allows a court to permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced and any applicable fees be paid.

In this instance, the court, in granting the order of reference, relied upon, among other things, the Kennedy affidavit, including the statement by the affiant that he knew the referee and the court would rely on the truth and veracity of the statements contained therein. This court finds that the present inability or unwillingness of plaintiff to confirm the veracity of the execution or notarization of the Kennedy affidavit does not render the papers submitted in support of an order of reference to have been infected with a mere ministerial

mistake, defect or irregularity (CPLR 2001, 5019[a])). Rather, plaintiff's inability or unwillingness to confirm goes to the substantive validity of the order of reference, insofar as it calls into question the methodology used by plaintiff to procure the order, and thereby affects the substantial rights of the parties (see *U.S. Bank N.A. v Hamilton*, Sup Ct, Queens County, May 31, 2012, index No. 7644/2008, Sampson, J.; *IndyMac Fed. Bank FSB v Urquhart*, Sup Ct, Queens County, February 9, 2012, index No. 24321/2008, Elliot, J.; *US Bank N.A. v Ramdihall*, Sup Ct, Queens County, November 7, 2011, Taylor, J., index No. 4903/2009; *Wells Fargo Bank, N.A. v Bogado*, Sup Ct, Queens County, September 12, 2011, index No. 12970/2009 [decision by the undersigned]; *U.S. Bank N.A. v Hemraj*, Sup Ct, Queens County, September 12, 2011, index No. 23557/2009 [decision by the undersigned])).

It is further noted the Anderson affidavit offered in support of that branch of the motion by plaintiff for leave to enter a default judgment against defendants is insufficient to constitute proof of the facts constituting the claim. On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing (see CPLR 3215(f); *Atlantic Cas. Ins. Co. v RJNJ Services, Inc.*, 89 AD3d 649, 651 [2011]). In this instance, the complaint is verified by counsel, who lacks personal knowledge of the facts, and the Kennedy affidavit is suspect. Pat K. Anderson is not a party to this action, and plaintiff has failed to submit an affidavit of one of its officers, or of a person acting with a valid power of attorney from plaintiff, with personal knowledge of the relevant facts constituting the claim, the default, and the amount due its own. Thus, plaintiff has failed to present evidence sufficient to support the entry of a default judgment (see *HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 736 [2009]; *Henriquez v Purins*, 245 AD2d 337 [1997]; CPLR 3215[f]).

Under such circumstances, that branch of plaintiff's motion pursuant to CPLR 5019 and 2001 to substitute the affidavit of merit previously filed with the court, "validate" the order of reference and for leave to enter a default judgment is denied, and the court, by its own motion, vacates the order of reference because the propriety of the execution and notarization of the Kennedy affidavit cannot be confirmed (see *U.S. Bank N.A. v Hamilton*, Sup Ct, Queens County, May 31, 2012, index No. 7644/2008, Sampson, J.; *IndyMac Fed. Bank FSB v Urquhart*, Sup Ct, Queens County, February 9, 2012, index No. 24321/2008, Elliot, J.; *Wells Fargo Bank, N.A. v Abad*, Sup Ct, Queens

County, August 29, 2011, Agate, J., index No. 13531/2008; *Wells Fargo Bank NA v Shivmangal*, Sup Ct, Queens County, July 12, 2011, Kerrigan, J., index No. 23627/2008; *contra HSBC Bank USA v Reynoso*, Sup Ct, Queens County, September 27, 2011, James J. Golia, J., index No. 5643/08).

With respect to that branch of the motion by plaintiff for leave to amend the Osher affirmation and the notice of pendency, nunc pro tunc, the assignment of mortgage, assigning the subject mortgage, "[t]ogether with the moneys" then due and owing, from Wells Fargo to plaintiff, is dated October 29, 2009. The Osher affirmation mistakenly stated that the assignment of the subject mortgage was dated November 6, 2009, and such mistaken date of assignment also appears in the notice of pendency. To disregard this mistake would not prejudice a substantial right of any party. That branch of the motion by plaintiff for leave to amend the notice of pendency nunc pro tunc as proposed is granted (CPLR 2001; *U.S. Bank Nat. Ass'n v Dellarmo*, 94 AD3d 746 [2012]).

Dated: Long Island City, NY  
July 10, 2012

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**ROBERT J. McDONALD**  
**J.S.C.**