

**One West Bank, F.S.B. v Pedutem**

2014 NY Slip Op 31902(U)

July 21, 2014

Supreme Court, Madison County

Docket Number: 2009-2186

Judge: Eugene D. Faughnan

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This opinion is uncorrected and not selected for official publication.

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Madison County Courthouse, Wampsville, New York, on the 27th day of June, 2014.

PRESENT: HON. EUGENE D. FAUGHNAN  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : MADISON COUNTY

ONE WEST BANK, F.S.B.,

Plaintiff,

DECISION AND ORDER

Index No. 2009-2186  
RJI No. 2010-0037

-vs-

JOHN PEDUTEM, PEOPLE OF THE STATE  
OF NEW YORK, ET. AL

Defendants.

EUGENE D. FAUGHNAN, J.S.C.

Plaintiff moved this Court by Notice of Motion dated June 2, 2014, seeking an Order granting Restoration, Vacatur of prior Orders, Ratification of Order Appointing Referee to Compute, and Judgment of Foreclosure and Sale, and for such other relief as this Court deemed proper. Plaintiff submitted an Affirmation of Regularity of Michelle Maccagnano, Esq., dated June 2, 2014, and the Exhibits thereto. The matter came before this Court at a Motion Term on June 27, 2014, and neither the Plaintiff nor any Defendants appeared. The Court has considered the papers submitted in this matter, and after due deliberation makes the following determination.

This matter was commenced by the filing of a Summons and Complaint on December 2, 2009. An Order of Reference was signed on June 30, 2010. A Referee's Report was completed and dated September 7, 2010. That was made a part of Plaintiff's application for Judgment of Foreclosure and Sale, which was filed with the County Clerk on October 5, 2010. Then by letter dated November 1, 2010, and filed with the County Clerk on November 5, 2010, Plaintiff's counsel requested that its *ex parte* application for Judgment of Foreclosure and Sale be withdrawn (without providing any explanation as to the reason), but further advising that the action was not being discontinued.

Thereafter, there was no action, until a Change of Attorney was submitted in January, 2012. However, Plaintiff took no further steps with respect to the pursuit of the foreclosure.

There was then no further activity until the Court sent a letter dated July 17, 2013 to Plaintiff's counsel directing the parties to appear in Court on September 18, 2013. At that time, the Plaintiff appeared by local counsel and the Court directed that any motions be made by October 25, 2013, or the matter would be dismissed as abandoned. No motion was made, and the Court issued an Order dated October 30, 2013, dismissing the Plaintiff's application for an Action for Foreclosure, without prejudice, and cancelled the *lis pendens*.

On January 16, 2014, Plaintiff submitted a motion seeking to vacate the Order of dismissal, and then restore the matter to the Court's calendar to then Ratify the Prior Order of Reference, and to further grant a Judgment of Foreclosure and Sale. The case was placed on the

Court's motion calendar for February 21, 2014. However, there were no appearances by the parties at the motion. As a result, the Court issued a Decision and Order denying the Plaintiff's motion, and specifically observed:

In this case, oral argument was required, and Plaintiff's attorneys even wrote a letter to all parties advising that ... the motion was returnable on February 21, 2014, and that oral argument was required. Nevertheless, there was no appearance on behalf of the Plaintiff. Given the unique, and somewhat exceptional request being made to vacate a prior Judge's Order, and then to reinstate a prior Order, the Court had a number of questions for the Plaintiff, particularly with respect to the request to replace an insufficient affidavit from the prior Order of Reference with a new one. However, with the non-appearance at oral argument, those questions could not be posed or answered. Given those circumstances, the Plaintiff has failed to avail itself of the opportunity to argue in support of its motion, and the Court concludes that Plaintiff has failed to show an entitlement to the relief sought in the motion.

The Plaintiff's motion was denied, which essentially left intact, the prior Order of dismissal without prejudice.

Plaintiff then filed another motion on June 4, 2014, requesting the same relief (except adding vacatur of the March 12, 2014 Order), and another Notice of Pendency was also submitted with the motion. An Affirmation of Regularity was submitted in support of the motion. In that Affirmation, the prior non-appearance was explained as law office failure and it was claimed that the matter was addressed internally and staff members advised accordingly. Yet, despite those assurances, there still was no appearance made at the motion of June 27, 2014. A letter was submitted from the Plaintiff's attorney's office dated July 1, 2014. However, that letter will not be considered by the Court as it is untimely, and was not before the Court at the time the Decision was Reserved at the time for argument on the motion.

This action is more than 4 1/2 years old, with an Order of Reference signed just over 4 years ago. An application for Judgment of Foreclosure and Sale was withdrawn, and the case lay dormant until the Court wrote to prompt some action a year ago. Since then, Plaintiff has failed to file a timely motion or appear at a motion term (in October, 2013-resulting in dismissal without prejudice), then failed to appear at the motion on February 21, 2014, resulting in denial of the motion for vacatur of the dismissal and restoration of the action. Then, the Plaintiff again failed to appear at the motion on July 27, 2014.

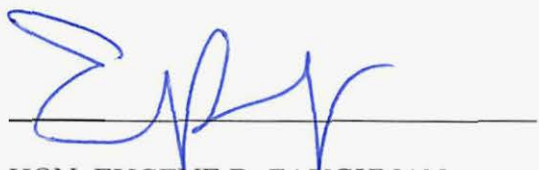
Under 22 NYCRR 202.27, subsection c, if at any scheduled call of a calendar, neither party appears, the judge make such order as appears just. The Court finds that Plaintiff has repeatedly failed to appear, and failed to avail itself of the opportunity for oral argument, and the Court has already noted that it would have questions concerning the motion. Despite assurances that the law office failure would be remedied, the Plaintiff failed to appear at oral argument on June 27, 2014. This was following the failures to appear at the call of the motion calendars on October 25, 2013, and February 21, 2014. Therefore, under CPLR 3404 and 22 NYCRR §202.27, the Court concludes that the Plaintiff's motion must be denied, and further, that this matter should be dismissed, and that the *lis pendens* be cancelled.

Accordingly, it is hereby,

**ORDERED**, that Plaintiff's Motion is hereby **DENIED**, and it is hereby further **ORDERED**, that this action is **DISMISSED WITH PREJUDICE, AND ANY ASSOCIATED LIS PENDENS SHALL BE VACATED**, and it is hereby further

**ORDERED**, that Plaintiff shall file a copy of this Order with the Madison County Clerk's Office, with Notice of Entry to the Defendants, within 14 days of the date of this Order.

**SO ORDERED THIS** 21<sup>st</sup> **DAY OF JULY, 2014 IN WAMPSVILLE (MADISON COUNTY), NEW YORK.**



HON. EUGENE D. FAUGHNAN  
SUPREME COURT JUSTICE

TO: Frenkel, Lambert Weiss Weisman & Gordon, LLC  
Marianne Kincaid, Chief Court Clerk