

<b>U.S. Bank, N.A. v Mollah</b>
2016 NY Slip Op 30528(U)
March 18, 2016
Supreme Court, Queens County
Docket Number: 23563/08
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE      **IA Part 6**  
**Justice**

\_\_\_\_\_  
 U.S. BANK , N.A.,  
                                 Plaintiff,

-against-

MOHAMMED MOLLAH, et al.,  
                                 Defendants.  
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Index  
 Number 23563/ 08

Motion  
 Date December 23, 2015

Motion Seq. No. 9

Motion Cal. No. 96

The following papers read on this motion by defendant Wells Fargo Bank, N.A. s/h/a “Mortgage Electronic Registration Systems, Inc., as Nominee and Mortgagee of Record; Advisors Mortgage Group, LLC” pursuant to CPLR 3212 for summary judgment declaring that its mortgage lien is superior to the mortgage lien of plaintiff and plaintiff’s mortgage lien is void as against defendant Wells Fargo Bank, N.A.; and this cross motion by plaintiff to remove all stays of the instant action, pursuant to CPLR 3212 and 3211(b) for summary judgment for the relief requested in its amended complaint, to strike the answer of defendant Wells Fargo Bank, N.A., including the affirmative defenses and counterclaim, to dismiss the amended complaint as against defendants “John Doe” and “Jane Doe” and for leave to amend the caption accordingly.

Papers  
Numbered

Notice of Motion - Affidavits - Exhibits .....1-4  
 Notice of Cross Motion - Affidavits - Exhibits .....5-9  
 Answering Affidavits - Exhibits .....10-17  
 Reply Affidavits .....18-23

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

Plaintiff commenced this action seeking to foreclose on a mortgage dated March 14, 2008 and recorded on May 28, 2008, given by defendant Mohammed Mollah on the real property

known as One Broadway, Howard Beach, New York (the Mollah mortgage) to secure repayment of a note, evidencing a loan in the original principal amount of \$417,000.00 plus interest, from Dream House Mortgage Corp. In the complaint, plaintiff alleged the Mollah mortgage was assigned to it pursuant to an assignment dated September 4, 2008, defendant Mollah defaulted under the note and mortgage by failing to pay the monthly mortgage installment due on May 1, 2008 and thereafter, and as a consequence, plaintiff elected to declare the entire mortgage debt to be due and owing. Plaintiff named “Mortgage Electronic Registration Systems, Inc., as Nominee and Mortgagee of Record; Advisors Mortgage Group, LLC” (Advisors), as a party defendant,<sup>1</sup> seeking to foreclose a mortgage given by defendant Tariq Reza to Advisors on March 18, 2008 and recorded against the subject property on March 28, 2008 (the Advisors mortgage). Plaintiff alleged that the Mollah mortgage lien has priority over the Advisors mortgage lien.

Wells Fargo Home Mortgage responded to the complaint, and served an answer asserting that it had been sued as defendant “Mortgage Electronic Registration Systems, Inc., as Nominee and Mortgagee of Record; Advisors Mortgage Group, LLC.”<sup>2</sup> Wells Fargo Home Mortgage alleged it was the holder of the Advisors mortgage, and the Advisors mortgage was an open and valid mortgage, and had record priority over the Mollah mortgage.

Wells Fargo Home Mortgage then moved for summary judgment dismissing the complaint insofar as asserted against it on the ground that the Advisors mortgage lien has record priority over the Mollah mortgage lien. Plaintiff cross-moved pursuant to CPLR 3025 for leave to file and serve a supplemental summons and amended complaint. Plaintiff sought to add “Bangla Estate, Inc.” and “Bashir Rahman” as party defendants, and assert a cause of action (the second cause of action) against them for unjust enrichment based upon their alleged wrongful retention of mortgage loan proceeds. By order dated November 30, 2011, the motion by Wells Fargo Home Mortgage was denied, the cross motion by plaintiff was granted, and plaintiff was directed to serve and file the supplemental summons and amended complaint. The supplemental summons and amended complaint retains “Mortgage Electronic Registration Systems, Inc., as Nominee and Mortgagee of Record; Advisors Mortgage Group, LLC” as a party defendant,<sup>3</sup> but

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<sup>1</sup>

Although plaintiff used a semi-colon between “Mortgage Electronic Registration Systems, as Nominee and Mortgagee of Record” and “Advisors Mortgage Group, LLC,” in the original complaint, in the mortgage dated March 18, 2008, Advisors Mortgage Group, LLC is named as the lender, and MERS is named as the nominee for the lender and the lender’s successors and assigns, and as the mortgagee of record for the purpose of recording the mortgage. Plaintiff continues use of the semi-colon in the supplemental summons. It is unclear whether plaintiff considers there to be two defendants, i.e. MERS and Advisors, or whether the presence of the semi-colon between those names in the caption is an error.

<sup>2</sup>see n 1.

<sup>3</sup>

see n 1.

does not name Wells Fargo Home Mortgage or Wells Fargo Bank, N.A. as a party defendant.

Following service and filing of the supplemental summons and amended complaint upon counsel for Wells Fargo Home Mortgage, that same counsel served an amended answer on behalf of Wells Fargo Bank, N.A., indicating that Wells Fargo Bank, N.A. was the party responding to the amended complaint insofar as asserted against “defendant Mortgage Electronic Registration Systems, Inc., as Nominee and Mortgagee of Record; Advisors Mortgage Group, LLC.” In this amended answer, defendant Wells Fargo Bank, N.A. asserts various affirmative defenses, and claims it is the holder of the Advisors mortgage and that the Advisors mortgage lien is open and valid, and has record priority over the Mollah mortgage. Defendant Wells Fargo Bank, N.A. asserts three (3) cross claims against defendant Mollah, and interposes a counterclaim. Defendant Wells Fargo Bank, N.A. alleges that plaintiff’s alleged mortgage interest in the property is void as against it pursuant to Real Property Law § 291. Plaintiff served a reply to the amended answer.

Defendant Wells Fargo Bank, N.A. moves for summary judgment in its favor and against plaintiff. Plaintiff opposes the motion, and cross-moves for summary judgment in its favor, to strike the amended answer, affirmative defenses and counterclaim of defendant Wells Fargo Bank, N.A., to dismiss the amended complaint insofar as asserted against defendants “John Doe” and “Jane Doe,” and for leave to amend the caption accordingly. Defendant Wells Fargo opposes the cross motion. The remaining defendants have not appeared in relation to the motion or cross motion.

At the outset, the court notes that plaintiff has failed to demonstrate issue has been joined with respect to those defendants other than defendant Wells Fargo Bank, N.A. (CPLR 3212[a]). That branch of the cross motion by plaintiff for summary judgment against defendants Mollah, Reza, American Express Centurion Bank, New York City Transit Adjudication Bureau, New York City Environmental Control Board, New York City Parking Violations Bureau, New York State Department of Taxation and Finance, Bangla Estate, Inc. and Bashir Rahman is denied as premature (*see City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]).

The court further notes that the motion by defendant Wells Fargo Bank, N.A. for summary judgment does not violate the general proscription against successive summary judgment motions, because it is being made by defendant Wells Fargo Bank, N.A. – as opposed to Wells Fargo Home Mortgage (which is no longer a defendant herein) – and is based upon information obtained by the parties from depositions conducted after the denial of the prior motion for summary judgment by Wells Fargo Home Mortgage (*see Auffermann v Distl*, 56 AD3d 502, 502 [2d Dept 2008]; *Staib v City of New York*, 289 AD2d 560, 561 [2d Dept 2001]).

Nevertheless, the motion by defendant Wells Fargo Bank, N.A. for summary judgment against plaintiff, and that branch of the cross motion by plaintiff for summary judgment against defendant Wells Fargo Bank, N.A. are untimely made. By compliance conference order dated

December 16, 2013, plaintiff was directed to file a note of issue and certificate of readiness by March 28, 2014. The note of issue and certificate of readiness were filed on March 27, 2014. By so-ordered stipulation dated June 11, 2014, the time in which to make summary judgment motions was extended to September 26, 2014, a period of 107 days. The motion and cross motion were served well beyond the deadline set in the so-ordered stipulation since defendant Wells Fargo Bank, N.A. served its motion on September 1, 2015 and plaintiff served its cross motion on November 4, 2015.

Defendant Wells Fargo Bank, N.A. and plaintiff contend that their delay in making their respective motions should be excused. They claim that the running of the 107-day period set in the “so-ordered” stipulation became stayed by virtue of an automatic stay in bankruptcy.

It is undisputed that following joinder of Bashir Rahman as a party defendant herein, Bashir Rahman filed a petition on July 16, 2013, seeking protection under Chapter 7 of the U.S. Bankruptcy Code, which imposed an automatic stay of this action (*see* 11 USC § 362[a]). According to the docket sheet of the Bankruptcy Court, Bashir Rahman obtained an order of discharge entered on October 17, 2013 (*see* 11 USC § 350[a]). Although counsel for defendant Wells Fargo Bank, N.A. asserts that U.S. Bank, N.A. subsequently moved to reopen the bankruptcy case, the docket sheet indicates Bashir Rahman was the movant, and that he sought to reopen his bankruptcy case to include U.S. Bank, N.A. as an additional creditor (*see* 11 USC § 350) and related relief. The docket sheet also indicates that an order was entered by the bankruptcy court on July 9, 2014 granting the motion. (A copy of this order has not been submitted by the parties.) The bankruptcy case was closed by final decree on July 27, 2015.

Under 11 USC § 362(c)(2)(C), the automatic stay, invoked upon the filing of a petition in bankruptcy, expires upon discharge.<sup>4</sup> To the extent plaintiff and defendant Wells Fargo Bank, N.A. assert that the reopening of Rahman’s bankruptcy case reactivated the automatic stay, the stay provided by virtue of 11 USC § 362 is not automatically reinstated upon the reopening of a Chapter 7 bankruptcy case (*see In re Agha*, 2015 WL 739828 [Bankr. E.D. CA 2015] [automatic

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<sup>4</sup>11 USC § 362(c) in relevant part provides:

(c) Except as provided in subsections (d), (e), (f), and (h) of this section--

...

(2) the stay of any other act under subsection (a) of this section continues until the earliest of--

- (A) the time the case is closed;
- (B) the time the case is dismissed; or
- (C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

stay terminated by operation of law upon the entry of the Chapter 7 debtor's discharge and was not resurrected upon reopening of the case]; *In re Brumfiel*, 514 B.R. 637 [Bankr. D. Colo. 2014] [relief from stay for foreclosure sale unnecessary after case closed and stay terminated since reopening case to avoid liens did not reinstate stay]; *In re Burke*, 198 B.R. 412 [Bankr. S. D. Ga. 1996] [reopening of Chapter 7 case did not reinstate automatic stay]; *In re Gruetzmacher*, 145 B.R. 270 [Bankr. W.D. Wis. 1991]; *In re Trevino*, 78 B.R. 29 [Bankr. M.D. Pa. 1987] [automatic stay was terminated when final discharge was entered and was not reinstated upon reopening of case]; *see also In Re Rosillo*, 2007 WL 2230765 [Bankr S.D. NY 2007] [automatic stay not reinstated when case is reopened pursuant to § 350(b)]; *In re Crocker*, 362 B.R. 49, 56 [1st Cir B.A. P. 2007] ["several bankruptcy courts have ... concluded that the reopening of a case does not reinstate the automatic stay...."]).

Plaintiff and defendant Wells Fargo Bank, N.A. have made no showing the Bankruptcy Court granted a stay upon the reopening of the bankruptcy case (*see* 11 USC § 105; *In re Crocker*, 362 B.R. 49 [1st Cir BAP 2007]; *see e.g. In re King*, 2003 WL 1562144 [Bankr. D. VT. 2003]).<sup>5</sup> Additionally, and notwithstanding plaintiff's request to "remove" all stays in this action, plaintiff and defendant Wells Fargo Bank, N.A. have failed to demonstrate that this court stayed this action, including the effectiveness of the "so-ordered" stipulation, upon the reopening of the bankruptcy case. Therefore that branch of the cross motion by plaintiff to "remove" all stays of this action is denied as moot.

Plaintiff and defendant Wells Fargo Bank, N.A. have failed to offer a good cause for their delays in making their respective motions for summary judgment. In the absence of a showing of good cause for their delays, their untimely motions for summary judgment may not be entertained (CPLR 3212[a]; *see Brill v City of New York*, 2 NY3d 648 [2004]; *Fuller v Westchester County Health Care Corp.*, 32 AD3d 896 [2d Dept 2006]; *Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986 [2d Dept 2005]). The motion by defendant Wells Fargo Bank, N.A. for summary judgment against plaintiff and that branch of the cross motion by plaintiff for summary judgment against defendant Wells Fargo Bank, N.A. are denied, without consideration of the merits of the respective motions.

In relation to the cross motion by plaintiff pursuant to CPLR 3211(b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (CPLR 3211[b]). On a motion to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*Vita v New York Waste Servs., LLC*, 34 AD3d 559 [2d Dept 2006]; *see Ramanathan v Aharon*, 109 AD3d 529, 531 [2d Dept 2013]). When reviewing a motion to dismiss an affirmative defense, the pleadings are liberally construed in favor of the party asserting the defense and that party is given the benefit of every reasonable inference (*see Bank of N.Y. v Penalver*, 125 AD3d

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Of course, the bankruptcy court has jurisdiction to interpret and enforce its own prior orders (*see Yu Yun Dong v Ruiz*, 103 AD3d 442 [1<sup>st</sup> Dept 2013]).

796 [2d Dept 2015]; *Fireman's Fund Ins. Co. v. Farrell*, 57 AD3d 721, 723 [2d Dept 2008]).

That branch of the cross motion by plaintiff to dismiss the first affirmative defense asserted by defendant Wells Fargo Bank, N.A. in its answer based upon failure to state a cause of action is denied. The assertion of the defense in an answer may not be subject to motion to strike or provide a basis to test sufficiency of the complaint (*see Butler v Catinella*, 58 AD3d 145,150 [2d Dept 2008]; *Riland v Frederick S. Todman & Co.*, 56 AD2d 350 [1st Dept 1977]).

That branch of the cross motion by plaintiff to dismiss the second affirmative defense asserted by defendant Wells Fargo Bank, N.A. in its amended answer based upon failure to join necessary parties is granted. RPAPL 1311 provides that a necessary defendant is one “whose interest is claimed to be subject and subordinate to the plaintiff’s lien.” Plaintiff obtained a title report prior to the commencement of the action, and named those parties with a possible interest in the property as defendants. Defendant Wells Fargo Bank, N.A. has failed to demonstrate any necessary party defendants have been omitted.

That branch of the cross motion by plaintiff to dismiss the third, sixth, eighth, ninth, tenth and eleventh affirmative defenses asserted by defendant Wells Fargo Bank, N.A. in its amended answer based upon the doctrine of estoppel, the parole evidence rule, waiver, ratification, acquiescence and the doctrine of unclean hands is granted. Defendant Wells Fargo Bank, N.A. has failed to allege or prove any facts supporting these conclusions of law (*see Moran Enterprises, Inc. v Hurst*, 96 AD3d 914 [2d Dept 2012]; *Glenesk v Guidance Realty Corp.*, 36 AD2d 852 [2d Dept 1971], *abrogated on other grounds by Butler v Catinella*, 58 AD3d 145; CPLR 3018[b]).

That branch of the motion by plaintiff to dismiss the fourth affirmative defense asserted by defendant Wells Fargo Bank, N.A. in its amended answer based upon a defense founded upon documentary evidence is denied. Plaintiff has failed to demonstrate that the affirmative defense is without merit as a matter of law.

That branch of the cross motion by plaintiff to dismiss the fifth affirmative defense asserted by defendant Wells Fargo Bank, N.A. in its amended answer based upon equitable subrogation is granted. Defendant Wells Fargo Bank, N.A. fails to allege or prove any facts demonstrating that it is entitled to be subrogated to the rights of any senior encumbrancer.

The seventh affirmative defense asserted by defendant Wells Fargo Bank, N.A. in its amended answer is based upon unjust enrichment. Defendant Wells Fargo Bank, N.A. has failed to allege or prove any facts in support of the claimed unjust enrichment, including any allegation that plaintiff received something of value at its expense. That branch of the cross motion by plaintiff to dismiss the seventh affirmative defense asserted by defendant Wells Fargo Bank, N.A. in its amended answer is granted.

That branch of the cross motion by plaintiff to dismiss the twelfth affirmative defense

asserted by defendant Wells Fargo Bank, N.A. in its amended answer based upon failure to mitigate damages is granted. Mitigation of damages is not an affirmative defense to an action to foreclose a mortgage. Any dispute as to the exact amount owed plaintiff pursuant to the mortgage and note, may be resolved after a reference pursuant to RPAPL 1321 (*see Crest/Good Mfg. Co. v Baumann*, 160 AD2d 831 [2d Dept 1990]).

That branch of the cross motion by plaintiff to dismiss the thirteenth affirmative defense asserted by defendant Wells Fargo Bank, N.A. in its amended answer is denied. Defendant Wells Fargo Bank, N.A. alleges that any damages suffered by plaintiff were not caused by it. It cannot be said at this point that this defense is without merit (*see CPLR 3211[b]; Ramanathan v Aharon*, 109 AD3d at 531).

That branch of the cross motion by plaintiff to dismiss the fourteenth affirmative defense asserted by defendant Wells Fargo Bank, N.A. in its answer based upon voluntary payment is granted. The voluntary payment doctrine is inapplicable to defendant Wells Fargo Bank, N.A. and has no bearing on this case (*see NYP Holdings, Inc. v McClier Corp.*, 65 AD3d 186, 189 [1<sup>st</sup> Dept 2009] [voluntary payment doctrine bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law]).

That branch of the cross motion by plaintiff to dismiss the fifteenth affirmative defense asserted by defendant Wells Fargo Bank, N.A. in its amended answer based upon the statute of frauds is granted. Plaintiff had no contractual relationship with defendant Wells Fargo Bank, N.A. or other relationship resembling privity. In addition, the subject mortgage complies with the statute of frauds.

That branch of the cross motion by plaintiff to dismiss the sixteenth affirmative defense asserted by defendant Wells Fargo Bank, N.A. in its amended answer is granted. Defendant Wells Fargo Bank, N.A. alleges that plaintiff's claims are barred by the terms and conditions of the loan documents. Defendant Wells Fargo Bank, N.A., however, has failed to identify the terms or conditions of the loan documents which bar plaintiff's claims asserted herein.

That branch of the cross motion by plaintiff to dismiss the seventeenth affirmative defense asserted by defendant Wells Fargo Bank, N.A. in its amended answer is granted. Contrary to the allegation by defendant Wells Fargo Bank, N.A., this foreclosure action has raised a justiciable controversy (*see Acocella v Bank of New York Mellon*, 127 AD3d 891 [2d Dept 2015]).

That branch of the cross motion by plaintiff to dismiss the eighteenth affirmative defense asserted by defendant Wells Fargo Bank, N.A. in its amended answer based upon improper venue is granted. In this instance, proper venue is Queens County where the subject property is situated (CPLR 507).

That branch of the cross motion by plaintiff to dismiss the nineteenth affirmative defense

asserted by defendant Wells Fargo Bank, N.A. in its amended answer based upon res judicata and collateral estoppel is granted. The causes of action asserted by plaintiff herein have not previously been litigated in any other action. Contrary to the assertion of defendant Wells Fargo Bank, N.A., the issue of whether plaintiff's mortgage interest was void as against the Reza mortgage interest, was not previously determined on the merits against plaintiff in relation to the prior motion in this action by defendant Wells Fargo Home Mortgage. It is worthy of mention that the court denied the motion, indicating plaintiff had raised triable issues of fact, such as whether Wells Fargo Home Mortgage had standing to assert a claim, and whether Advisors had notice of Mollah's interest in the property due to the presence of Mollah at the time of the Reza mortgage closing. By such determination, the court did not find those issues of fact were the only outstanding ones.

The twentieth affirmative defense asserted by defendant Wells Fargo Bank, N.A. in its amended answer is based upon lack of subject matter jurisdiction. The Supreme Court is a court of original, unlimited and unqualified jurisdiction (*see Kagen v Kagen*, 21 NY2d 532, 537 [1968]; NY Const., art VI, § 7) and is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed (*see Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 166 [1967]). The court has the competence to adjudicate plaintiff's claims. That branch of the cross motion by plaintiff to dismiss the twentieth affirmative defense asserted by defendant Wells Fargo Bank, N.A. in its amended answer is granted.

That branch of the cross motion by plaintiff to dismiss the twenty-first affirmative defense asserted by defendant Wells Fargo Bank, N.A. in its amended answer is granted. Defendant Wells Fargo Bank, N.A. alleges that plaintiff's claims are barred by state and federal statutes and regulations, but has failed to identify which ones serve to bar this action.

That branch of the cross motion by plaintiff to dismiss the twenty-second, twenty-third and twenty-fourth affirmative defenses asserted by defendant Wells Fargo Bank, N.A. in its amended answer based upon its claims that it is a bona fide encumbrancer pursuant to Real Property Law § 291 and that it holds a mortgage, which is open and valid, which has record priority over plaintiff's mortgage is denied. Plaintiff has failed to demonstrate that these affirmative defenses are without merit as a matter of law.

The counterclaim asserted by defendant Wells Fargo Bank, N.A. against plaintiff is based upon its claim that plaintiff's mortgage interest in the subject property is void as against it pursuant to Real Property Law § 291. Defendant Wells Fargo Bank, N.A. seeks to bar plaintiff, and every person claiming under plaintiff, from claiming an estate or interest in the property. To the extent plaintiff cross-moves to dismiss the counterclaim of defendant Wells Fargo Bank, N.A. pursuant to CPLR 3211, issue has already been joined (*see CPLR 3212; Rich v Lefkovits*, 56 NY2d 276 [1982]). To the extent plaintiff seeks summary judgment dismissing the counterclaim pursuant to CPLR 3212, that branch of the cross motion cannot be entertained insofar as it untimely made (*see Brill v City of New York*, 2 NY3d 648; *Fuller v Westchester County Health Care Corp.*, 32 AD3d 896; *Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986). That

branch of the cross motion by plaintiff to dismiss the counterclaim asserted by defendant Wells Fargo Bank, N.A. is denied.

The branches of the motion by plaintiff to dismiss the amended complaint as against defendants “John Doe” and “Jane Doe” and for leave to amend the caption to reflect the dismissal are granted. Plaintiff has ascertained that the subject property is vacant and as a result, defendants “John Doe” and “Jane Doe” are unnecessary party defendants to this action.

It is ORDERED that the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
QUEENS COUNTY

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U.S. BANK, N.A.,

Plaintiff ,

Index No. 23563/2008

-against-

MOHAMMED MOLLAH, MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC., AS NOMINEE AND  
MORTGAGEE OF RECORD; ADVISORS MORTGAGE  
GROUP LLC; TARIQ REZA; AMERICAN EXPRESS  
CENTURION BANK; NEW YORK CITY TRANSIT  
ADJUDICATION BUREAU; NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD; NEW YORK  
CITY PARKING VIOLATIONS BUREAU; NEW YORK  
STATE DEPARTMENT OF TAXATION AND FINANCE;  
BANGLA ESTATE, INC., and BASHIR RAHMAN,  
Defendants

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Dated: March 18, 2016

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**Howard G. Lane, J.S.C.**