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| <b>State of N.Y. Mtge. Agency v Massarelli</b>   |
| 2017 NY Slip Op 33150(U)   |
| June 15, 2017  |
| Supreme Court, Schenectady County  |
| Docket Number: 901689-17   |
| Judge: Christina L. Ryba   |
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STATE OF NEW YORK  
SUPREME COURT COUNTY OF SCHENECTADY

STATE OF NEW YORK MORTGAGE AGENCY,  
Plaintiff,

**DECISION/ORDER**

-against-

Index No. 901689-17  
RJI No. 01-17-123999

JULIANE MASSARELLI a/k/a JULIANE O'BRIEN,  
NEW YORK STATE DEPARTMENT OF TAXATION  
AND FINANCE, "JOHN DOE", said name being fictitious  
and unknown to plaintiff, the persons or parties intended being  
the persons or parties, if any, having or claiming an interest in,  
or lien upon the premises described in the complaint,  
Defendants.

APPEARANCES:

McCabe, Weisberg & Conway PC  
For Plaintiff  
145 Huguenot Street, Suite 210  
New Rochelle, NY 10801

Timothy Shevy, Esq.  
For Defendant Juliane Massarelli a/k/a Juliane O'Brien  
1528 Columbia Turnpike, Suite 203  
Castelton, NY 12033

RYBA, J.,

On September 16, 2005, defendant Juliane Massarelli a/k/a Juliane O'Brien (hereinafter defendant) executed a \$136,800.00 note secured by a mortgage on her property located at 2 Matilda Street in the City of Albany. Defendant defaulted on the mortgage by failing to make the regular monthly payment of principal and interest due on May 11, 2011, prompting plaintiff to commence a mortgage foreclosure action in July 2012. In the context of the 2012 foreclosure action, defendant moved to dismiss the complaint on the ground that plaintiff lacked standing to sue. Plaintiff failed to oppose the motion, and the Court (Platkin, J.) thereafter issued an order dated September 10, 2013

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dismissing the action “with prejudice”.

Thereafter, on July 8, 2016, plaintiff and defendant executed a Stipulation Canceling Notice of Pendency and a Stipulation of Discontinuance wherein the parties agreed that the 2012 foreclosure action was discontinued “without prejudice”. Defendant has evidently failed to make any further payments on the mortgage and remains in default. Consequently, plaintiff commenced the present action in March 2017 seeking to foreclose on the mortgage for the entire principle balance due of \$120,689.15 plus interest thereon from April 1, 2011. Defendant now moves for an order dismissing the complaint pursuant to CPLR 3211 (a) (1) on the ground that a defense is founded upon documentary evidence, and pursuant to CPLR 3211 (a) (5) on the ground that the action is barred by principles of res judicata. Plaintiff opposes the motion.

In support of her motion, defendant argues that the order dismissing the 2012 foreclosure action “with prejudice” constitutes documentary evidence that conclusively operates to bar the present action under principles of res judicata. This argument is without merit. Initially, by executing the aforementioned stipulation whereby she agreed that the 2012 foreclosure action was concluded “without prejudice” to the commencement of a future action, defendant arguably waived any claim that the “with prejudice” language of the prior order precludes this second mortgage foreclosure action. In any event, even assuming that the “with prejudice” language of the prior order remains in effect, this does not automatically require dismissal of plaintiff’s action. “Even where a dismissal is specifically ‘on the merits’ or ‘with prejudice’, the circumstances must warrant barring the litigant from further pursuit of his claim in order for those phrases to be given preclusive effect” (Stacey O v Donald P, 137 AD2d 965, 966–67 [1988]; see, Art Guild Gallery v Charmack, 107 AD2d 777, 778 [1985]). Courts may within their discretion limit, and even disregard, “on the merits” or “with prejudice” language in the interests

of justice (see, Forte v Kaneka Am. Corp., 110 AD2d 81, 84 [1985]; Art Guild Gallery v Charmack, 107 AD2d at 778 [1985]; Matter of Horton, 51 AD2d 85 [1976]). Here, given defendant's arguable waiver of the "with prejudice" language, and in light of defendant's continued failure to make any payments on her mortgage for a period of more than six years, the Court deems it an appropriate exercise of discretion to disregard the "with prejudice" language in the interests of justice.

Finally, even if the Court did not disregard the "with prejudice" language in the prior order, it would nonetheless conclude that the prior order should not be accorded res judicata effect in this action. Res judicata prevents a party from relitigating "a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter" (Matter of Hunter, 4 NY3d 260, 269, [2005]; see, Matter of Bemis v Town of Crown Point, 121 AD3d 1448, 1450 [2014]; Evergreen Bank v Dashnaw, 246 AD2d 814, 815 [1998]). Defendant sought and obtained dismissal of 2012 mortgage foreclosure action based upon her assertion that plaintiff "failed to demonstrate that it has standing to commence this foreclosure action, since it failed to establish how or when it became the lawful holder of the note". It is well settled that a dismissal for lack of standing is not a dismissal on the merits (see, Ricatto v Mapliedi, 133 AD3d 737 [2015]; Farkas v New York State dept. of Civil Serv., 114 AD2d 563 [1985]). Accordingly, principles of res judicata are inapplicable.

For the foregoing reasons, it is

ORDERED that the motion is denied, without costs, and it is further

ORDERED that the defendant Juliane Massarelli a/k/a Juliane O'Brien is directed to serve an answer to the complaint within 20 days of service of this decision and order upon her with notice of entry.

This Memorandum constitutes the Decision and Order of the Court. This original Decision

and Order is being returned to the attorney for the plaintiff. The below referenced original papers are being transferred to the Albany County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

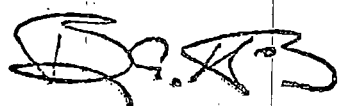
SO ORDERED.

ENTER.

Dated: June 15, 2017



HON. CHRISTINA L. RYBA  
Supreme Court Justice



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