

**U.S. Bank N.A. v Sommers**

2018 NY Slip Op 34542(U)

September 5, 2018

Supreme Court, Onondaga County

Docket Number: Index No. 2015-1603

Judge: James P. Murphy

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Onondaga County, NY  
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**SU-2015-001603**

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At a term of the Supreme Court of the State of New York, held in and for the County of Onondaga, on August 30, 2018.

PRESENT: HON. JAMES P. MURPHY, J.S.C.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3,

Plaintiff,

v.

FRANCIS SOMMERS A/KA FRANCIS X. SOMMERS,

Defendants.

**DECISION,  
ORDER AND  
JUDGMENT  
OF DISMISSAL**

133 Jasper Street  
Syracuse, NY 13203

Index No. 2015-1603  
RJI No. 33-16-1755

**DECISION**

Before the Court is Plaintiff's Motion dated July 12, 2018 for an order vacating this Court's **Conditional Order and Judgment of Dismissal** signed on **February 24, 2017**, returnable before the Court on August 30, 2018. There being either no appearance in the action or no opposition to the motion from any of the answering parties, the Court has elected to take the matter upon submission and issue this **Decision, Order and Judgment of Dismissal**.

The Court signed an **Order of Reference** in the above matter on **July 7, 2016** which provided that it is

**ORDERED** that on or before 11/30/16 [*the Court will insert this date*], the plaintiff shall submit as appropriate a Motion or an Ex Parte application in compliance with all legal and administrative requirements for a Judgment of Foreclosure and Sale; and it is further

**ORDERED** that in the event plaintiff fails to timely submit the required Motion or Ex Parte application for a Judgment of Foreclosure and Sale, in its discretion, the Court may either (1) strike all interest accruing on the loan as of the subject date together with any and all late fees, penalties, property inspection fees and preservation costs; or (2) dismiss the action for plaintiff's failure to comply with the Court's deadline (*see Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, 5 NY3d 514 (2005)*).

The Plaintiff did not submit either a Motion or an Ex Parte Application, as appropriate, for a Judgment of Foreclosure and Sale as of **February 24, 2017**, nor did Plaintiff seek any extension from the Court of the deadline to submit the same.

The Court signed a **Conditional Order and Judgment of Dismissal** on **February 24, 2017** and the said **Conditional Order and Judgment of Dismissal** was filed in the Onondaga County Clerk's Office on **February 27, 2017** and service of the same was made by mail on **March 1, 2017**.

The **Conditional Order and Judgment of Dismissal** provided that it is

**ORDERED AND ADJUDGED**, that should the Plaintiff submit either a Motion or an Ex Parte Application, as appropriate, in compliance with all legal and administrative requirements, for a Judgment of Foreclosure and Sale on or before **April 10, 2017**, the dismissal of the above-entitled action will be vacated by the Court in the said Judgment of Foreclosure and Sale. The failure of the Plaintiff to submit either a Motion or an Ex Parte Application, as appropriate, in compliance with all legal and administrative requirements, for a Judgment of Foreclosure and Sale, will constitute the ignoring of a second deadline set by the Court, warranting dismissal of the above-entitled action (*see Citimortgage, Inc. v. Petragnani*, 137 AD3d 1677 [2016]).

The Plaintiff did not submit either a Motion or an Ex Parte Application, as appropriate, for a Judgment of Foreclosure and Sale as of **April 10, 2017**, nor did Plaintiff seek any extension from the Court of the deadline to submit the same.

On or about **March 2, 2018**, the Plaintiff submitted a Motion for a Judgment of Foreclosure and Sale and the Court returned the motion papers together with a letter dated **March 6, 2018** advising that the matter had been previously dismissed.

The Plaintiff's basis for requesting that the **Conditional Order and Judgment of Dismissal** dated February 24, 2017, be vacated is

15. On May 13, 2016, the Plaintiff moved for an Order of Reference. Plaintiff's motion was entered by the Court by order dated July 7, 2016.
16. Plaintiff mailed Notice of Entry of the Order of Reference to defendant or their attorney on July 22, 2016.
17. This court appointed Dorina A. Armani, Esq., as Referee to compute the amount due the Plaintiff and to examine and report whether the mortgaged property can be sold in parcels.
18. Based upon our firm's records, on August 19, 2016, Plaintiff submitted its proposed oath and report with supporting documentation to the referee.
19. On August 31, 2016, the appointed referee requested additional information with supporting documentation.

20. On September 8, 2016, Plaintiff submitted further documentary proof to the appointed referee.
21. Per the e-mail dated September 20, 2016, provided by the Court appointed referee in her oath and report, she advised that the Order of Reference would be amended so no hearing was required for the computation.
22. The Court then issued a Conditional Order and Judgment of Dismissal dated February 24, 2017, whereby Plaintiff's action would be dismissed if the motion for Judgment of Foreclosure and Sale is not filed by April 10, 2017.
23. On September 27, 2017, Plaintiff's counsel contacted the referee seeking status and left a voicemail.
24. On November 6, 2017, additional documentary evidence was provided to the Referee.
25. On November 28, 2017, our office again followed-up with the appointed referee.
26. On December 4, 2017, our office called the appointed referee and left a message.
27. On December 20, 2017, our office again contacted the appointed referee for further status.
28. On January 11, 2018, our office again followed-up with the referee.
29. On January 29, 2018, the executed oath and report was received.
30. On January 24, 2018, the Referee executed an Oath and Report of Amount Due which computed the amount due the Plaintiff to be \$89,064.41 as of January 12, 2016, and determined that the property should be sold as one parcel.
31. Our office then conducted a review of the current title search to ensure there were no other judgment creditors that needed to be named.
32. On March 2, 2018, Plaintiff filed a motion for a Judgment of foreclosure and sale.
33. By letter dated March 6, 2018, the Court rejected Plaintiff's motion as the action had been dismissed based on non-compliance with the Court's Order dated February 24, 2017.
48. Plaintiff further respectfully submits to the Court that it had sufficient cause for the delays in proceeding with this action.
62. Plaintiff submits that there is sufficient cause for this Court to grant the instant motion. The Referee requested additional documentation, which was provided but there was still issues concerning the Court's Order of Reference and ultimately, the case was dismissed. The Referee ultimately did provide the oath and report and a motion for judgment was filed but after the action was already dismissed.

63. As such, this Court should find that Plaintiff does have sufficient cause for the delay.

(Affirmation of Fernando C. Rivera-Maissonet, Esq. dated June 15, 2018).

Based upon the information contained in the aforementioned Affirmation and the Court's own records, the time line for the activity on this matter is as follows:

07-07-16	Order of Reference signed
07-07-16	Order of Reference <u>filed by Court</u> and mailed to Leopold & Associates
08-19-16	Oath and Report mailed to Referee
08-31-16	
09-08-16	Communications with Referee [Six (6) months elapsed time]
09-20-16	
02-24-17	Conditional Dismissal Order
09-27-17	
11-06-17	
11-28-17	Communications with Referee [Eleven (11) months elapsed time]
12-04-17	
12-20-17	
01-11-18	
01-29-18	Referee's Oath and Computation received by Leopold & Associates
03-12-18	Motion for Judgment of Foreclosure and Sale filed
03-06-18	Motion for Judgment of Foreclosure and Sale returned by Court
07-25-18	Motion to Vacate Dismissal and for Judgment of Foreclosure and Sale filed

At no time did the Plaintiff notify the Court of any of the difficulties it was having with respect to meeting the Court's deadline due to communication issues with the Court-appointed Referee and request a substitution of the Court-appointed Referee or an extension of the deadlines set forth in the Court's Order. The Plaintiff instead chose to ignore both the Court's Order of Reference dated July 7, 2016 (by not requesting an extension of time) and the Court's Conditional Order and Judgment of Dismissal dated February 24, 2017 (by not requesting a further extension of time). The Plaintiff ignored its responsibility to comply with Order of Reference over a period of seventeen (17) months without ever advising the Court of the difficulties it was having with the Court-appointed Referee or seeking the Court's assistance with the same.

Plaintiff's counsel determined that it was better to ignore the Court's Conditional Order and Judgment of Dismissal and then ask the Court to vacate its Conditional Order and Judgment of Dismissal over eleven (11) months later, rather than to contact the Court and advise it of the status of the matter and request an extension from the Court of the deadline at the time the deadline was imminent.

Here, no reasonable excuse or explanation has been offered for the failure to comply with the Order of Reference dated July 7, 2017 or to merely seek an extension from the Court of the deadline to submit the same and no reasonable excuse or explanation has been offered for the failure to comply with the Conditional Order and Judgment of Dismissal dated February 24, 2017 or to merely seek an extension from the Court of the deadline to submit the same.

The Court does not have the duty or resources to ascertain Plaintiff's intent with regard to this litigation.

Furthermore, no explanation has been offered for the lapse of almost eleven (11) months from the date the Plaintiff received the Conditional Order and Judgment of Dismissal dated February 24, 2017 and the filing of the motion to vacate.

Accordingly, the Court's basis for issuing the Conditional Order and Judgment of Dismissal was the failure of the Plaintiff to comply with the deadlines set forth in the Order of Reference signed on July 7, 2016 ("Litigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated [*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 (2004); *Brill v City of New York*, 2 NY3d 648 (2004); *Kihl v Pfeffer*, 94 NY2d 118 (1999)]." *Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, et al.*, 5 NY3d 514 at 521 [2005]).

The failure of the Plaintiff to submit either a Motion or an Ex Parte Application, as appropriate, in compliance with all legal and administrative requirements, for a Judgment of Foreclosure and Sale, as ordered by the Court in two (2) separate Orders warrants the dismissal of the above-entitled action (*see Citimortgage, Inc. v. Petragnani*, 137 AD3d 1677 [2016]).

The Court is further denying the application for an order to vacate the Conditional Order and Judgment of Dismissal inasmuch as plaintiff's motion to vacate was brought approximately eleven (11) months after the dismissal order (*see US Bank N.A. v. Sinay*, 147 AD3d 1364 [4th Dept 2017]).

### ORDER AND JUDGMENT

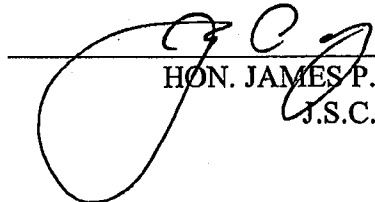
NOW, it is hereby

**ORDERED AND ADJUDGED** that the Plaintiff's Motion dated July 12, 2018 for an order to vacate the **Conditional Order and Judgment of Dismissal** dated February 24, 2017 is hereby **denied**, and it is further

**ORDERED AND ADJUDGED** that all other requests for relief are hereby **denied**.

Dated: July 9/5, 2018

ENTER,

  
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HON. JAMES P. MURPHY  
J.S.C.