

Bank of N.Y. Mellon v Licari

2022 NY Slip Op 34660(U)

March 11, 2022

Supreme Court, Suffolk County

Docket Number: Index No. 603934/2018

Judge: John H. Rouse

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This opinion is uncorrected and not selected for official publication.

Index Number: 603934/2018

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

P R E S E N T:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 04/21/2021
ADJ. DATE: 01/20/2022
Mot. Seq. 004-MG

MOTION DATE: 04/21/2021
ADJ. DATE: 01/20/2022
Mot. Seq. 005-MD
CASEDISP
e-filed partial participation

The Bank Of New York Mellon Fka The Bank Of New
York, As Trustee For The Certificateholders Of Cwabs
Inc., Asset-Backed Certificates, Series 2007-10,

Plaintiff

-against-

Donna Marie Licari, John Licari, American Express Bank,
Fsb, Bissett Nursery Corp., Capital One Bank (Usa) Na,
Discover Bank, Maida Ny Inc., Main Street Acquisitions
Corp A/P/O Hsbc Bank Nevada, N.A., Commissioner Of
Taxation And Finance, United States Of America - Internal
Revenue Service, John Does And Jane Does, Said Names
Being Fictitious, Parties Intended Being Possible Tenants
Or Occupants Of Premises And Corporations, Other
Entities Or Persons Who Have, Claim, Or May Claim, A
Lien Against, Or Other Interest In, The Premises,

DECISION AND ORDER

Defendants

TO:

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion (Sequence 004) by Defendant John Licari for an Order/Judgment, pursuant to CPLR 3215(c) dismissing the Action and the underlying amended complaint, as against him, as abandoned; and an Order/Judgment for such other and further related relief as this Court deems just, proper, and appropriate; and (2) Notice of Motion by Defendant Marie Licari for an Order, pursuant CPLR § 3216 (a), dismissing the underlying complaint in its entirety; and an Order or Judgment, for such other and further relief as this Court may deem just, proper, or appropriate; and (3) e-filed documents 1-75; it is

ORDERED that, within 10 days of service of this decision and order with notice of entry, Donna Marie Licari will file with this court, in the NYSCEF system under this Index Number, a notice providing both her mailing address and the address of her primary residence where she can receive notices and be served with important legal papers; and it is further

ORDERED that, within 10 days of service of this decision and order with notice of entry, John Licari will file with this court, in the NYSCEF system under this Index Number, a notice providing both his mailing address and the address of his primary residence where he can receive notices and be served with important legal papers; and it is further

ORDERED that the motion by Defendant John Licari for an Order, pursuant to CPLR § 3215(c) dismissing the Action and the underlying amended complaint against him, as abandoned, is *granted* and this action is dismissed without prejudice; and it is further

ORDERED that the motion by Defendant Donna Marie Licari for dismissal of the action against her pursuant to CPLR § 3216 is *denied*, but upon the requirements of *LaSalle Bank N.A. v Benjamin*, 164 AD3d 1223 (2nd Dept 2018), and the dismissal of the action against the other borrower on the note, Defendant John Licari, this action is dismissed without prejudice.

SUBMIT JUDGMENT ON NOTICE IN CONFORMITY WITH 22 NYCRR 202.48.

DECISION

On February 28, 2018, Plaintiff, by its counsel Rosicki, Rosicki & Associates, PC, commenced this action in foreclosure to recover upon a thirty-year note with an original principal amount of \$413,000.00, borrowed at a fixed rate of 7.875% per annum that was signed by the Defendants, Donna Marie Licari and John Licari on May 25, 2007. The Licaris acknowledged and signed a mortgage on premises known as 20 David Street, Holbrook NY 11741 to secure the repayment of the note. Plaintiff alleges the Defendants default in paying the monthly payment due on March 1, 2012, with the principal then remaining due on the note being \$393,520.59.

On March 16, 2018, Defendant Donna Licari appeared by counsel and filed a pre-answer motion (Sequence 001) pursuant to CPLR § 3211(a)(3) and (8) to dismiss for lack of capacity and for lack of personal jurisdiction, or in the alternative, for an order directing Rosicki, Rosicki & Associates, PC to file proof pursuant to CPLR § 322(a) to produce evidence of its authority to represent the Plaintiff in this action.

On March 29, 2018, Plaintiff, again by Rosicki, Rosicki & Associates, PC, filed an amended complaint. Plaintiff did not oppose the motion (Sequence 001) and by decision and order dated May 8, 2018, this court directed counsel representing Plaintiff to file proof of its authority to act for Plaintiff and, failing that, on motion on notice the action would be dismissed. [See e-filed document 51](#). On April 19, 2018, Plaintiff filed proof of personal service of the Amended Complaint on John Licari as made on April 12, 2018.

On May 31, 2018, Defendant Donna Licari moved (Sequence 002) for an Order, pursuant to CPLR § 3126(3) and 6514, striking the amended complaint, canceling the underlying lis pendens, and awarding Defendant \$485.00 in costs and disbursements for Rosicki's and Plaintiff's willful noncompliance with the order of this Court dated May 8, 2018. This court, by decision and order dated July 3, 2018, granted the motion by Defendant Marie Licari without opposition, and dismissed the case without prejudice and cancelled the notice of pendency. [See e-filed document 57](#).

On September 24, 2018, Plaintiff moved (Sequence 003) to vacate the judgment dismissing the action and explained it had incorrectly provided its e-mail address in this action and had no notice of the two previous motions. The Court, by decision and order dated November 15, 2018, restored the action and reinstated the Notice of Pendency. [See e-filed document 82](#).

On December 4, 2018, the United States Attorney for the Southern District of New York announced a settlement with Rosicki, Rosicki & Associates, PC for fraud and the payment of six million dollars to resolves claims that Rosicki, Rosicki & Associates, PC, had systematically generated false and inflated bills for foreclosure-related and eviction-related expenses. See

<https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-settlement-civil-fraud-claims-against-law-firm-rosicki>

On January 3, 2019, Defendant, Donna Marie Licari, filed and answer with counterclaims. [e-filed document 86](#). Defendant denied the Plaintiff had properly serve the 90-day pre-action notice as required by RPAPL §§ 1303, 1304 and the filing required by RPAPL § 1306.

On March 21, 2019, Plaintiff filed a consent to change attorneys from Rosicki, Rosicki & Associates, PC to Davidson Fink, LLP. [See e-filed document 91](#).

On February 14, 2020, Defendant Donna Licari, by counsel, served a demand on Plaintiff pursuant to CPLR § 3216 to resume prosecution and file a note of issue within 90 days. Plaintiff has not filed a note of issue.

Now Defendant, Frank Licari, moves (Sequence 004) this court for an order dismissing this action against him on the ground he defaulted in excess of one year ago and the Plaintiff did not move for a default judgment against him.

“CPLR 3215(c) provides that if the plaintiff fails to take proceedings for the entry of judgment within one year after a default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts shall dismiss claims (CPLR 3215[c]) for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned. The one exception to the otherwise mandatory language of CPLR 3215(c) is that the failure to timely seek a default on an unanswered complaint or counterclaim may be excused if sufficient cause is shown why the complaint should not be dismissed. To establish sufficient cause, the party opposing dismissal must demonstrate that it had a reasonable excuse for the delay in taking proceedings for entry of a default judgment and that it has a potentially meritorious action. Although the determination of what constitutes a reasonable excuse lies within the sound discretion of the New York Supreme Court, reversal is warranted if that discretion is improvidently exercised.”

United States Bank N.A. v Moster, 196 AD3d 663 (2d Dept 2021).

Defendant argues that the malfeasance of its prior counsel should excuse Plaintiff from having moved for a default judgment against the Defendant within one year. The Defendant Frank Licari defaulted in answering on May 2, 2018. The Plaintiff’s current counsel appeared in this action in March of 2019 and no motion for a default judgment had been made, and the SARS-CoV-2 pandemic did not strike New York until March of 2020. When a party’s chosen counsel fails to represent its interests, it is not for the other party to the action to suffer the prejudice, the remedy is due from the offended party’s own counsel.

Accordingly, the motion by Defendant Frank Licari to dismiss the action against him without prejudice, as having been abandoned is granted.

Defendant Donna Marie Licari moves (Sequence 005) for dismissal of the action pursuant to CPLR § 3216. The Plaintiff is correct that the ongoing foreclosure moratorium that had been in place from March of 2020 and did not expire until January 15, 2022, excuses it from its obligation to file a note of issue within 90 days of service of the February 14, 2020, CPLR § 3216 notice.

However, the Appellate Division of the Supreme Court, Second Department held in *LaSalle Bank N.A. v Benjamin*, 164 AD3d 1223 (2d Dept 2018) that, in a case such as this, when the case is dismissed as against one necessary party to the note the action could not continue as against the remaining party on the note. See also *MTGLQ Invs., L.P. v Shay*, 190 AD3d 527 (1st Dept 2021) citing *LaSalle Bank N.A. v Benjamin*, albeit with understandable doubts expressed. This court is bound by the decisions of the Appellate Division of the Supreme Court, Second Department. *Mtn. View Coach Lines, Inc. v Storms*, 102 AD2d 663 (2d Dept., 1984).

Further, insofar as the public policy is so strong that mortgagors each be provided the RPAPL § 1304 pre-action notices¹ the Defendants, Donna Marie Licari and John Licari, will file in this action a notice of their respective mailing addresses and their respective residential addresses where each will be assured to receive these important notices, and each can be confident they will be served with process without risk of default. Neither the Plaintiff nor the Defendants desire this case to proceed in Kafkaesque fashion. This court assuredly does not.

Dated: March 11, 2022

ENTER:



JOHN H. ROUSE

ACTING J.S.C.

FINAL DISPOSITION

¹ See e.g.: *Deutsche Bank Natl. Trust Co. v Blackman*, ___AD3d___, 2022 NY Slip Op 01289 (2nd Dept., March 2, 2022); *Deutsche Bank Natl. Trust Co. v Salva*, ___AD3d___, 2022 NY Slip Op 01290 (2nd Dept. March 2, 2022) citing *Bank of Am., N.A. v Kessler*, 202 AD3d 10 (2d Dept 2021); and see *U.S. Bank N.A. v Campbell*, ___AD3d___, 2022 NY Slip Op 01198 (2nd Dept. Feb. 23, 2022)