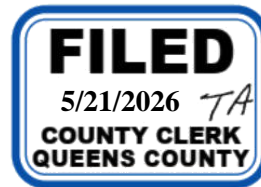


FC201, LLC v Martinez
2026 NY Slip Op 32055(U)
May 20, 2026
Supreme Court, Queens County
Docket Number: Index No. 711258 /2024
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J, KERRIGAN IA Part 10

Justice

-----X
FC201, LLC,

Index No.: 711258 /2024

Plaintiff,
-against-

Motion
Date: September 22, 2025

VALENTIN MARTINEZ, et. al.,

Defendants.

Motion Seq. No. 2

-----X

The following numbered papers read on this motion by plaintiff pursuant to CPLR 3212 for summary judgment against the defendant Valentin Martinez, striking the answer and dismissing his affirmative defenses, and the appointment of a referee to determine the amount due; and on the cross-motion by the defendant Valentin Martinez pursuant to CPLR 3212 for summary judgment dismissing the complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	EF 40-54
Notice of Cross-Motion - Affidavits - Exhibits..	EF 56-72
Answering Affidavits - Exhibits.....	EF 73-78

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

Plaintiff commenced this action by filing the notice of pendency and the summons and complaint on May 29, 2024. Plaintiff seeks to foreclose on a mortgage given by the defendant Valentin Martinez as record owner, of the subject real property, known as, 94-34 42nd Avenue East Elmhurst, NY, to secure a note in the principal amount of \$96,000. The plaintiff

alleges that it is the holder of the mortgage and underlying obligation and that a default occurred under the terms of the mortgage by the failure to make the monthly installment payment due on December 1, 2010 and as a consequence, the plaintiff elected to accelerate the entire mortgage debt. On September 4, 2024, the defendant filed an answer that, among other things, raised the affirmative defense of a prior action pending pursuant to RPAPL 1301. The plaintiff has moved for summary judgment and an order of reference. The defendant has cross-moved for summary judgment dismissing the action.

The plaintiff's predecessor-in-interest, Star201, LLC, commenced a prior action seeking to foreclose on the subject mortgage in Queens County Supreme Court under Index No. 712094/2021. Star201 moved for summary judgment in the prior action and the defendant Valentin Martinez cross-moved to dismiss the action on the ground, among other reasons, that Star201 lacked capacity to sue as an unregistered LLC. In a short form order dated March 14, 2023, the court in the prior action granted the cross-motion to the extent that Star201 was directed to provide proof of compliance with Limited Liability Company § 802 within 30 days and the failure to do so shall result in the dismissal of the action. Star201 did not file proof of compliance with Limited Liability Company § 802. Thereafter, on April 17, 2023, Star201 noticed an appeal of the short form order. On December 18, 2023, Star201 perfected the appeal. On September 25, 2026, the court issued an order dismissing the prior action pursuant to 22 NYCRR § 202.27. On November 5, 2025, the court issued a judgment of dismissal pursuant to the short form order dated March 14, 2023 and the dismissal order dated September 5, 2025. In an order dated April 8, 2026, the Appellate Division Second Department, found that the court in the prior action had erred in conditionally granting the defendant's cross-motion, reversed the order dated March 14, 2023, denied the cross-motion and remitted the matter back to the Supreme Court, Queens County for a determination on the merits of the plaintiff's motion. The plaintiff, thereafter, moved to vacate the order after conference and the judgment of dismissal based on the decision of the Appellate Division. It was during the pendency of the appeal of the prior action, that the plaintiff commenced this action.

The court turns first to the cross-motion by the defendant Martinez for summary judgment dismissing the complaint. A party moving for summary judgment must show by admissible evidence

that there are no material issues of fact in controversy and that they are entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Under the Foreclosure Abuse Prevention Act (FAPA), RPAPL 1301 was amended and RPAPL 1301(3) now states:

While the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, including an action to foreclose the mortgage, without leave of the court in which the former action was brought. The procurement of such shall be a condition precedent to the commencement of such other action and the failure to procure such leave shall be a defense to such other action. For purposes of this subdivision, in the event such other action is commenced without leave of court, the former action shall be deemed discontinued upon the commencement of the other action, unless prior to the entry of a final judgment in such other action, a defendant raises the failure to comply with this condition precedent therein, or seeks dismissal thereof based upon a ground set forth in [CPLR 3211(a)(4)]....

The defendant Martinez argues that this action was commenced while the prior action was still pending, the plaintiff did not seek leave of court, he raised this as an affirmative defense, and that the failure to comply with this condition precedent requires dismissal of this action. The plaintiff argues that in light of the short form order dated March 13, 2023, which dismissed the prior action, that action was no longer pending when this action was commenced and it was not required to seek leave of court to commence this action. The court finds that the prior action was still pending when this action was commenced. Where appeals as of right in a foreclosure action are not exhausted the foreclosure action remains pending and undecided (*Davis v Wilmington Sav. Fund Socy. FSB*, 219 AD3d 798 [2d Dept 2023]; *Mizrahi v US Bank, N.A.*, 156 AD3d 617 [2d Dept 2017]). Here, the plaintiff appealed the order dismissing the action and, in fact, that order was reversed. Therefore, at the time this action was commenced the prior action was still pending. Inasmuch as the plaintiff did not seek leave of court, the defendant Martinez has established his prima face entitlement to summary judgment based on the

plaintiff's failure to seek leave of court prior to commencing this action while the prior action was still pending.

In opposition, the plaintiff failed to raise any issues of fact that would warrant denial of the cross-motion. The plaintiff first argues that prior action was not pending due to the dismissal order. As discussed above, since the appeal of that order was not exhausted, the prior action was still pending. The plaintiff next argues that because the defendant Martinez previously argued that the appeal in the prior action should be dismissed and the prior action should have been deemed to have been discontinued he should be judicially estopped from arguing that it was still pending. Inasmuch as the defendant Martinez did not obtain a favorable judgment in the prior action based upon that position, the doctrine of judicial estoppel does not apply in this case (see *Matter of One Beacon Ins. Co. v Espinoza*, 37 AD3d 607 [2d Dept 2007]; *European Am. Bank v Miller*, 265 AD2d 374 [2d Dept 1999]). Finally, contrary to plaintiff's argument, this was not a mere technical violation of RPAPL 1301(3) where a dismissal is not warranted. Additionally, the cases cited for this proposition predate the amendment to RPAPL 1301(3), which was part of FAPA. The new language of RPAPL 1301(3) clarifies that the failure to obtain leave is a condition precedent to the commencement of a new action and if the defense is raised the action must be dismissed. Thus, the defendant Martinez has established his entitlement to summary judgment dismissing this action pursuant to RPAPL 1301(3).

In light of the above determination, the plaintiff's motion for summary judgment and an order of reference is denied.

Accordingly the motion by the plaintiff pursuant to CPLR 3212 for summary judgment against the defendant Valentin Martinez, striking the answer and dismissing his affirmative defenses, and the appointment of a referee to determine the amount due is denied. The cross-motion by the defendant Valentin Martinez for summary judgment dismissing the complaint is granted and the action is dismissed.

Dated: May 20, 2026



Kevin J. Kerrigan, J.S.C.

