

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

**Present: Honorable MARTIN J. SCHULMAN
Justice**

Mortgage Foreclosure Part

BANK OF AMERICA, N.A.,

Plaintiff,

-against-

FELIX ALBERTO, et.al.,

Defendants.

Index No.: 0002663/14

Motion Date: 12/21/17

Motion Seq. No.: 1

**Referred on May 16, 2018
by Hon. Leslie Purificacion**

The following papers numbered 1 to 8 read on this motion by plaintiff for an order vacating the dismissal imposed on April 26, 2017, and restoring this case to active status, granting it summary judgment as against defendant Felix Alberto, for leave to enter a default judgment against the remaining defaulting parties, appointing a referee to compute, to amend the caption substituting Jamie Siguenza, Pablo Siguenza, Jenny Escoto, Malby Corona, Silvano Martinez, Tina Rosario, Jessica Rosario, Liz Martinez, Adrienne Cuevas and Cecilia Serverino in place of defendants “John Doe #1” through “John Doe #10”, and to substitute PROF-2013-S3 Legal Title Trust, by U.S. Bank National Association, as legal Title Trustee as party plaintiff in place of plaintiff Bank of America, N.A.

**PAPERS
NUMBERED**

Notice of Motion-Affidavits-Exhibits.....	1-3
Answering Affirmation-Exhibits.....	4-6
Reply Affidavits.....	7-8

Upon the foregoing papers, it is hereby ordered that this motion by plaintiff for an order (1) vacating the dismissal imposed on April 26, 2017, and restoring this case to active status, (2) granting it summary judgment as against defendant Felix Alberto (“Alberto”), (3) granting it

leave to enter a default judgment against the remaining defaulting parties, (4) appointing a referee to compute, and (5) amending the caption to substitute Jamie Siguenza, Pablo Siguenza, Jenny Escoto, Malby Corona, Silvano Martinez, Tina Rosario, Jessica Rosario, Liz Martinez, Adrienne Cuevas and Cecilia Serverino in place of defendants “John Doe #1” through “John Doe #10”, and to substitute PROF-2013-S3 Legal Title Trust, by U.S. Bank National Association, as legal Title Trustee as party plaintiff in place of plaintiff Bank of America, N.A., is denied, as follows:

This is an action to foreclose a mortgage on the premises located in Richmond Hill, New York, pursuant to a mortgage dated February 13, 2006, made by Alberto to Countrywide Bank N.A., which was recorded in the Office of the Clerk of Queens County on March 22, 2006. A second mortgage dated February 22, 2007 was executed by Alberto to Countrywide Home Loans, Inc. and Mortgage Electronic Systems, Inc., which was recorded on April 5, 2007. The two notes were consolidated pursuant to a Consolidated Extension and Modification Agreement dated February 22, 2007, which agreement was also recorded on April 5, 2007. The consolidated loan was modified pursuant to a Loan Modification Agreement dated July 11, 2009, which created a new loan in the combined amount. Copies of the Note, Mortgage, CEMA and Loan Modification Agreement are annexed to the moving papers.

The mortgage was assigned to plaintiff and recorded on November 1, 2011. It was subsequently corrected by a correction assignment dated December 6, 2013, which correction assignment was not recorded until April 10, 2014, two months after this action was commenced. The mortgage was later assigned to PROF 2013-S3 Legal Title Trust, by U.S. Bank National Association, as Legal Title Trustee, on February 19, 2016, which assignment was recorded on April 7, 2016. Copies of the assignments are annexed to the moving papers.

Pursuant to the terms of the Note, Mortgage, CEMA and Loan Modification Agreement, Alberto agreed to repay the note commencing on September 1, 2009, and continuing monthly through and including March 1, 2037.

The summons, complaint, certificate of merit and notice of pendency were filed on February 20, 2014. A second notice of pendency was filed on December 23, 2016. Copies of those documents are annexed to the moving papers. All of the defendants were served with the summons, complaint, and notices pursuant to RPAPL §1320 and RPAPL §1303 (1)(b). Alberto appeared in the action by the filing of a verified answer. None of the other defendants answered,

moved or appeared. Copies of the summons and complaint, answer, and affidavits of service are annexed.

Nine mandatory foreclosure settlement conferences were then conducted between August 21, 2014, and June 24, 2015, and plaintiff was permitted to proceed with foreclosure.

However, for nearly two years afterwards, plaintiff did not take any steps in the furtherance of this litigation. As a result of plaintiff's non-action, in January, 2017, the court administratively directed plaintiff to appear at a status conference to be held on February 8, 2017. Plaintiff appeared on February 8, 2017, and was directed by the court to file an Order of Reference on or before April 26, 2017. An order to that effect was generated on that date. Counsel for plaintiff appeared on the adjourned date of April 26, 2017, and informed the court that it was still waiting for the affidavit from the plaintiff, and for that reason, could not, and had not, filed the Order of Reference. The case was then dismissed for plaintiff's failure to comply with the February 8, 2017 order.

Plaintiff now moves to vacate that dismissal, and to restore this case to active status.

In order to vacate the dismissal order dated April 26, 2017, entered upon plaintiff's failure to submit the Order of Reference as directed by this court, the plaintiff is required to demonstrate both a reasonable excuse for its default, and a potentially meritorious cause of action. *See, CPLR §5015(a)(1); Eugene DiLorenzo, Inc. v Dutton Lbr. Co., 67 NY2d 138; Bank of N.Y. Mellon v Genova, 159 AD3d 1009; U. S. Bank, N.A. v. Dorelus, 140 AD3d 850; Apladenaki v Greepoint Mtge. Funding, In., 117 AD3d 975.*

The determination of what constitutes a reasonable excuse generally lies within the discretion of the court. *See, e.g., Madonna Mgt. Servs., Inc. v. R. S. Naghavi M. D. PLLC, 123 AD3d 986; 9 Bros. Bldg. Supply Corp. v Buoramicia, 106 AD3d 968.*

Here, the court finds that plaintiff has failed to articulate a reasonable excuse for its failure to submit the Order of Reference which led to the dismissal of this case. No explanation has been offered as to why plaintiff was unable to provide the required affidavit necessary for counsel to prepare the order of reference. Counsel admits to the late submission of the affidavit after the dismissal of this case, and states in the reply affirmation, "Plaintiff's counsel received the necessary affidavit (from its client) on May 4, 2017, which is after the court imposed deadline to file the motion for an order of reference."

Without the affidavit of merit, the order of reference could not be prepared. The fact that plaintiff supplied the affidavit to counsel one week later on May 4, 2017, does not excuse its failure to timely follow a direct order of this court in the first instance. It is incredulous to this court how plaintiff, Bank of America, N.A., a large national bank, was unable to produce this affidavit, which is required and submitted in every foreclosure case in this state, *within the five years* that it was assigned the underlying mortgage that is the subject of this action. The fact that plaintiff was still unable to produce the affidavit after the subsequent assignment of the mortgage in February 2016, and still later between February 8, 2017 and April 26, 2017, after this court *sua sponte* administratively called this case up out of its dormancy, and provide no explanation for its non-submission, is insufficient to demonstrate a reasonable excuse necessary to vacate the dismissal in this case.

Moreover, plaintiff has failed to offer an acceptable reason as to why it took five months to file this motion to vacate the dismissal. *See, Bank of N.Y. Mellon v. Genova, 159 AD3d 1009; Deutsche Bank Natl. Trust Co. v Gutierrez, 102 AD3 825; Arias v First Presbyt. Church in Jamaica, 100 AD3d 940.* Plaintiff's argument that it was "not in receipt" of a copy of either the February 8, 2017, or the April 26, 2017, orders until counsel remembered to check with the Queens County Clerk is not a reasonable explanation for its failure to have timely moved to vacate the dismissal. Counsel was physically present in the courtroom on both February 8, 2017, and April 26, 2017, and heard the court direct the submission of the order of reference, and heard the court dismiss the case. In any event, plaintiff received a copy of the April 26, 2017 order dismissing this case from the County Clerk's Office on June 9, 2017, and this motion was not filed until five months later on November 30, 2017.

This court, as a matter of discretion, and in the interest of fairness, has been more than lenient with plaintiff in this case, first, by administratively scheduling a status conference after years of inactivity, and then, by providing plaintiff with an additional three months to prepare an order of reference. The sole reason given by plaintiff for its failure to submit the order of reference as ordered was that plaintiff did not receive the required affidavit from its client, an excuse this court has repeatedly heard over the years from other plaintiffs in these mortgage foreclosure actions. No explanation is ever provided to the court as to why this simple affidavit cannot be provided. It can only be presumed that the non-compliance by the bank representatives

in these foreclosure actions is indicative of a pattern of persistent neglect in prosecuting these cases.

In light of the plaintiff's failure to demonstrate a reasonable excuse, it is unnecessary to consider whether it established the existence of a potentially meritorious cause of action. *See, e.g., Nationstar Mtg., LLC v Dekom*, __ AD3d __, __NY3d __, 2018 N.Y. App. Div. LEXIS 3467 (2nd Dep't., May 16, 2018); *Bank of N.Y. Mellon v Genova*, *supra*; *Wells Fargo Bank, N.A. v Pelosi*, 159 AD3d 852; *U.S. Bank, N.A. v Dorvelus*, *supra*; *Alvarez v Dedvukaj Constr., Inc.*, 138 AD3d 900.

Accordingly, the motion to vacate the dismissal is denied.

In light of the denial of the motion to vacate the dismissal, the plaintiff's other requests in this motion are denied as moot.

Dated: June 25, 2018

J. S. C.