

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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HSBC BANK USA, NATIONAL ASSOCIATION,
AS TRUSTEE FOR FREMONT HOME LOAN
TRUST 2006-E, MORTGAGE-BACKED
CERTIFICATES, SERIES 2006-E,

Index No. 0778/2013

Plaintiff,

-against-

AFFIRMATION

JEFF VINCI; TOWN SUPERVISOR TOWN OF
BROOKHAVEN; TOWN SUPERVISOR TOWN OF
ISLIP; STATE OF NEW YORK; "JOHN DOE #1"
through "JOHN DOE #12," the last twelve names
being fictitious and unknown to plaintiff, the persons
or parties intended being the tenants, occupants,
persons or corporations, if any, having or claiming
an interest in or lien upon the premises, described
in the complaint,

Defendants.

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MELISSA CORWIN, and attorney duly authorized to practice law before the Courts of this
State, hereby affirms the following under penalties of perjury:

1. That I am a Partner of the firm of SOMER, HELLER & CORWIN, LLP,
attorneys for the Defendant, JEFF VINCI, herein, and as such, I am familiar with the circumstances
of this matter. I make this affirmation in opposition to Plaintiff's motion for an Order Discontinuing
Action and Cancelling Lis Pendens, and further, in support of Defendant's cross-motion, which seeks
consolidation of the instant action with a certain duplicative 2015 foreclosure action commenced by
the Plaintiff against Defendant VINCI arising out of the same mortgage (Action #2), and ultimately
dismissal of both actions.

2. In summary, it is respectfully submitted that Actions #1 and #2 should be
consolidated by reason that both actions currently pending were commenced by the Plaintiff herein,
against Defendant, VINCI and both seek the very same relief, to wit: foreclosure of the subject

October 31, 2006 mortgage against the property known as 178 Oak Avenue, Shirley, New York 11967. Further, upon consolidation, this Court should dismiss both actions. Action #2 (commenced in 2015) should be dismissed as duplicative and in violation of RPAPL § 1301 as it seeks the exact same relief as Action #1, which was previously commenced in 2013 and already pending. Further, Action #2 was clearly filed in a disingenuous attempt to revive the instant Action #1, which is required to be dismissed by this Court pursuant to CPLR § 3215(c) by reason of Plaintiff's failure to timely move for an order of reference within one (1) year of the Defendant's alleged default. Accordingly, both actions should be consolidated and ultimately dismissed, along with dismissal of all notices of pendency filed by Plaintiff against the subject property.

PLAINTIFF'S MOTION TO DISMISS SHOULD BE DENIED
AND ACTIONS #1 AND #2 SHOULD BE CONSOLIDATED

3. The instant Action #1 was commenced by the filing of a Summons and unverified Complaint dated January 4, 2013 (a copy of which is annexed hereto as **Exhibit "A"**), and the filing of a Lis Pendens of even date (a copy of which is annexed hereto as **Exhibit "B"**). Said Complaint seeks foreclosure of an October 31, 2006 Mortgage (in the borrowed sum of \$328,500.00) which secured the property located at 178 Oak Avenue, Shirley, New York 11967.

4. Defendant VINCI interposed an Answer in Action #1 dated March 1, 2013, a copy of which is annexed hereto as **Exhibit "C"**.

5. On March 13, 2013, Plaintiff rejected Defendant VINCI's Answer by Notice of Rejection, a copy of which is annexed hereto as **Exhibit "D"** and declared Defendant VINCI in default.¹

¹ Upon information and belief, Plaintiff's affidavit of service purports service was made on January 14, 2013 and upon further information and belief, said affidavit of service was filed on January 17, 2013, thus making Defendant VINCI in default as of February 16, 2013 pursuant to CPLR § 308(2).

6. Plaintiff never moved for a default judgment or an order of reference in Action #1, which application, as discussed *infra*, was required to be made on or before February 16, 2014. Plaintiff made no further efforts, beyond rejection of the Answer, to prosecute Action #1 to conclusion.

7. Action #2 was commenced by the filing of a Summons and unverified Complaint dated November 20, 2015 (a copy of which is annexed hereto as **Exhibit "E"**), and the filing of a second Lis Pendens against the property also dated November 20, 2015 (a copy of which is annexed hereto as **Exhibit "F"**). Said Complaint seeks the exact same relief as in Action #1, to wit: foreclosure of the same October 31, 2006 Mortgage (in the borrowed sum of \$328,500.00) which secured property located at 178 Oak Avenue, Shirley, New York 11967.

8. Action #1 was pending at the time of commencement of Action #2 and both actions remain pending at this time and have been pending simultaneously for a period of eleven (11) months.

9. Under CPLR § 602, actions should be consolidated when they involve "a common question of law or fact." Clearly, since both actions seek the exact same relief, there is a common question of law and fact. Further, the parties (i.e. HSBC and VINCI) are the same in both Action #1 and Action #2.

10. Plaintiff was clearly aware that Action #1 remained pending at the time of commencement of Action #2. Action #1 had been pending for nearly three (3) years. Tellingly, Plaintiff only filed its Request for Judicial Intervention in connection with its instant motion to discontinue the action. Accordingly, there was never even any request by the Plaintiff to place the matter on the mandatory foreclosure settlement conference calendar.

11. It is clear that Plaintiff's motion to discontinue Action #1 is a disingenuous attempt

to circumvent the mandatory dismissal of Action #1 by reason of Plaintiff's failure to prosecute said action as more fully discussed *infra*. Plaintiff cannot fail to prosecute its initial action and then attempt to commence a second action to cure its procedural defects. It is respectfully submitted that this Court should deny the Plaintiff's motion to discontinue its action in its entirety and consolidate the Plaintiff's actions #1 and #2 for both judicial economy and for expediency, and further, in order to hold Plaintiff accountable for its attempt to circumvent this Court's rules.

UPON CONSOLIDATION ACTION #2 MUST BE DISMISSED

12. At the time of Plaintiff's commencement of Action #2 in December, 2015, Action #1 had *already been pending* for nearly three (3) years.

13. CPLR § 3211(a)(4) allows for dismissal of Action #2 because there is already another action between the same parties for the same cause of action in this Court (i.e. Action #1). There is absolutely no basis to allow Action #2 to survive and accordingly, it should be dismissed in its entirety pursuant to CPLR § 3211(a)(4).

14. Further, RPAPL § 1301(3) provides: "While an 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, without leave of court in which the former action was brought." Clearly, there was no leave of court obtained by Plaintiff in the instant action prior to commencement of the second action notwithstanding that the instant action was clearly pending in this Court and had been for almost three (3) years.

15. It is well-settled that the phrase "the action" in RPAPL § 1301(3) means a foreclosure action. See Marine Midland Bank, N.A. v. Lake Huntington Development Group, Inc., 185 A.D.2d 395, 396, 585 N.Y.S.2d 836 (3d Dept. 1992); Dollar Dry Dock Bank v. Piping Rock Builders, Inc., 181 A.D.2d 709, 710, 581 N.Y.S.2d 361 (2d Dept. 1992). Manifestly, the purpose of the foregoing section is to avoid multiple suits to enforce one mortgage. See Anron

Air Systems, Inc. v. Columbia Sussex Corp., 202 A.D.2d 460, 609 N.Y.S.2d 49 (2d Dept. 1994).

16. The failure to obtain leave of court to bring another action is a fatal defect vitiating the plaintiff's cause of action. The remedy is dismissal if such a second action is brought. See Security Nat. Servicing Corp. v. Liebowitz, 281 A.D.2d 615, 616, 722 N.Y.S.2d 69 (2d Dept. 2001).

17. Applying those legal principles to the instant matter, the result is clear. Action #1 was pending in this Court at the time Action #2 was commenced. The commencement of a second foreclosure action of the same mortgage is not a mere defect that the court has discretion to cure. RPAPL § 1301 and the National Security decision state to the contrary.

18. Based upon the foregoing, Plaintiff's Complaint in Action #2 fails to establish a cause of action because the pendency of a prior foreclosure action renders its cause of action in this case fatally defective, and accordingly dismissal of Action #2 is required under National Security, and under RPAPL § 1301 and CPLR § 3211(a)(7). Furthermore, dismissal is warranted based upon the documentary evidence of the pendency of the Complaint in Action #1 pursuant to CPLR § 3211(a)(1).

ACTION #1 MUST ALSO BE DISMISSED

19. Upon consolidation, and further upon dismissal of Action #2 as improperly commenced in violation of RPAPL § 1301, this Court must now turn to the Defendant's motion to dismiss Action #1. This is where the Court can see the disingenuous nature of Plaintiff's attempt to abandon Action #1 in favor of filing Action #2.

20. Action #1 was commenced by Complaint dated January 4, 2013 (Exhibit "A"), and the filing of a Lis Pendens of even date (Exhibit "B").

21. Defendant VINCI interposed an Answer in Action #1 dated March 1, 2013 (Exhibit "C").

22. On March 13, 2013, Plaintiff rejected Defendant VINCI's Answer by Notice of Rejection (Exhibit "D") as being untimely by approximately twenty-five (25) days.

23. Thereafter, Plaintiff never moved for a default judgment or an order of reference in Action #1, which application, was required to be made on or before February 16, 2014. Instead, Plaintiff sat back and did nothing for three (3) years and then commenced Action #2 in an effort to circumvent the mandatory dismissal of Action #1.

24. CPLR § 3215(c) requires that a Plaintiff commence proceedings for the entry of a default judgment within **one (1) year** after the default. See CPLR § 3215(c). In mortgage foreclosure actions, it is well-settled law that foreclosing plaintiffs, in order to avoid dismissal under CPLR § 3215(c), must take "the preliminary step toward obtaining a default judgment of foreclosure of sale by moving for an order of reference under RPAPL § 1321(1) within one year of the defendant's default". See Klein v. St. Cyprian Props., Inc., 100 A.D.3d 711, 954 N.Y.S.2d 170 (2d Dept. 2012); Wells Fargo Bank, N.A. v. Combs, 128 A.D.3d 812, 2015 WL 2214013 (2d Dept. 2015); HSBC Bank USA, N.A. v. Alexander, 124 A.D.3d 838, 2015 WL 361008 (2d Dept. 2015); U.S. Bank Natl. Ass'n v. Poku, 118 A.D.3d 980, 989 N.Y.S.2d 76 (2d Dept. 2014).

25. The language of CPLR § 3215 (c) is not discretionary, but mandatory, inasmuch as courts "shall" dismiss claims for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned. See Giglio v. NTIMP, Inc., 86 A.D.3d 301, 926 N.Y.S.2d 546 (2d Dept. 2011). The Appellate Division, Second Department has instructed that in cases wherein no motion is interposed within the one (1) year time limitation period, avoidance of a dismissal of the complaint as abandoned thus requires the plaintiff to offer a reasonable excuse for the delay in moving for leave to enter a default judgment and must demonstrate a potentially meritorious cause of action. See Id.

26. In the case sub judice, there is no reasonable excuse for the Plaintiff's three (3)

year delay. Nor is there any excuse for its attempt to commence a second action for the exact same relief in an effort to avoid dismissal under CPLR § 3215(c). The Plaintiff's tactics of rejecting Defendant's Answer, then sitting back for three (3) years without even attempting to schedule this matter on the mandatory settlement conference calendar, and then, commencing a second action in the hopes of hiding its fatal procedural defect, should not be tolerated. Action #1 should be dismissed in its entirety pursuant to CPLR § 3215(c).

ALL NOTICES OF PENDENCY MUST BE STRICKEN

27. Upon dismissal of both actions, both Notices of Pendency must be stricken pursuant to CPLR § 6514(a).

28. Moreover, based upon the facts before this Court, this Court clearly has a basis for discretionary cancellation under CPLR § 6514(b) by reason of the Plaintiff's bad faith filing of the second Notice of Pendency in connection with Action #2 when Plaintiff was clearly aware that Action #1, and its Notice of Pendency, had been filed and were pending.

WHEREFORE, it is respectfully requested that Plaintiff's motion for leave to discontinue Action #1 be denied in its entirety; and further, that Defendant's cross-motion for consolidation and ultimately dismissal of both Actions #1 and #2 be granted in its entirety, and for such other and further relief as this Court deems just and proper herein.

Dated: Commack, New York
October 19, 2016



MELISSA CORWIN