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<b>New Century Mtge. Corp. v Kogan</b>
2013 NY Slip Op 50047(U)
Decided on January 14, 2013
Supreme Court, Kings County
Rivera, J.
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Decided on January 14, 2013

**Supreme Court, Kings County**

<b>New Century Mortgage Corporation, Plaintiff,</b>
<b>against</b>
<b>Alexander Kogan, et. al, Defendants.</b>

7897/07

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Francois A. Rivera, J.

By notice of motion filed on September 4, 2012 under motion sequence two, plaintiff New Century Mortgage Corporation (hereinafter "NCMC" or "plaintiff") has moved for an order: (1) vacating an order dismissing the instant complaint dated August 29, 2011 pursuant to CPLR 5015; (2) granting leave to reargue its application for an order of reference pursuant to CPLR 2221; (3) overturning the prior determination denying the order of reference pursuant to CPLR 2221; (4) and granting the motion for an order of reference.

No one has appeared or submitted opposition to the motion.

## **BACKGROUND**

On March 7, 2007, NCMC commenced the instant action to foreclose a mortgage encumbering a condominium unit (hereinafter the subject property) located at 135 Oceana Drive, Apartment 2F, Brooklyn, New York by filing a summons, complaint and notice of pendency with the Kings County Clerk's office (KCCO). [\*2]

On June 29, 2007, NCMC moved for an order of reference. By decision and order dated May 12, 2008, this Court denied the motion because the affidavit of merit and amount due had been notarized in the State of Florida and was not accompanied by a certificate of conformity.

On February 13, 2009, NCMC again moved for an order of reference. For reasons set forth below, the February 13, 2009 motion was not decided.

## MOTION PAPERS

Plaintiff's unopposed motion papers contains an affirmation of its counsel, ten annexed exhibits labeled A through J, an affirmation of the mailing of the instant motion and a separate memorandum of law. Exhibit A is described as the recorded mortgage on the subject property. Exhibit B is described as the note. Exhibit C, D and E are described as copies of successive assignments of the mortgage encumbering the subject property. Exhibit F is a copy of this Court's order dated May 12, 2008, which denied plaintiff's motion for an order of reference. Exhibit G is a copy of this Court's compliance order. Exhibit H is a copy of this Court's dismissal order. Exhibit I is described as the OCA affirmation. Exhibit J is described as copy of the proposed Order of Reference.

## LAW AND APPLICATION

### *Motion for Reargument Pursuant to CPLR 2221*

Plaintiff has moved pursuant to CPLR 2221 for an order granting leave to reargue its application for an order of reference.

CPLR § 2221(d) provides: A motion for leave to reargue:

1. shall be identified specifically as such;
2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

"Motions for re-argument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision" ([Barnett v Smith](#), 64 AD3d 669, 670—671 [2d 2009] citing, [E.W. Howell Co., Inc. v S.A.F. La Sala Corp.](#), 36 AD3d 653 at 654 [2d 2007]; see also, [Beverage Marketing USA](#),

[Inc. v South Beach Beverage Co., Inc., 58 AD3d 657](#) [2d 2009]).

Annexed as exhibit J to NCMC's motion is a set of papers denominated as a proposed order of reference. A review of the dates on the documents contained therein reflects that it is not a copy of either plaintiff's prior motions seeking orders of reference. On June 27, 2009, NCMC filed its first motion for an order of reference with the KCCO. By decision and order dated May 12, 2008, this Court denied that motion. NCMC annexed a copy of the May 12, 2008 order to the instant motion but failed to include the underlying June 27, 2009 motion papers. On February 13, 2009, NCMC filed another motion for an order of reference with the KCCO. [\*3] NCMC further failed to annex a copy of the June 27, 2009 original motion papers. The Court did not decide that motion, rather issued an order to comply with the administrative order.

"The Court does not retain the papers following the disposition of an application and should not be compelled to retrieve the clerk's file in connection with its consideration of subsequent motions." (*Lower Main St. v Thomas Re & Partners*, 2005 WL 6760926, NYLJ, April 5, 2005, at 19, col 3, [Sup.Ct., Nassau County 2005], citing *Sheedy v Pataki*, 236 AD2d 92, 97 [3rd 1997]). Furthermore, CPLR 2214(c) requires that a party seeking leave to renew or reargue a motion must annex a complete set of the originally submitted motion papers (*see Biscone v Jetblue Airways Corp.*, — NYS2d —, 2012 WL 6684688 [2nd Dept 2012]).

NCMC's failure to include the originally submitted motion papers of the June 29, 2007 motion renders the instant application for reargument of the May 12, 2008 decision procedurally defective. This is but one of several problems with the request for reargument. The Court's order of May 12, 2008 reflects that it was filed with the KCCO on May 13, 2008. The instant motion for reargument of the June 29, 2007 motion was made more than three years after entry of the order denying it and is therefore untimely pursuant to CPLR 2221(d)(3). Even where a motion for reargument is technically untimely under CPLR 2221(d)(3), a court has discretion to reconsider its prior ruling ([HSBC Bank USA, N.A. v Halls](#), 98 AD3d 718, 721 [2nd Dept 2012]). However, the Court declines to do so, because NCMC not only failed to annex the originally submitted motion papers (*see Biscone v Jetblue Airways Corp.*, — NYS2d —, 2012 WL 6684688 [2nd Dept 2012]) but NCMC also failed to state the law or facts which the Court allegedly misapprehended or overlooked. Therefore, plaintiff's motion to reargue the June 29, 2007 motion for an order of reference is denied.

Although plaintiff's subsequent motion for an order of reference was not decided, it cannot be decided now because contrary to the requirements of CPLR 2214(c), the plaintiff did not annex the originally submitted motion papers of the February 13, 2009 motion to the instant motion.

***Motion To Vacate the Dismissal of the Complaint Pursuant to CPLR 5015***

Administrative Order 548/10, which was issued by the Chief Administrative Judge of the State of New York on October 20, 2010 (hereinafter the Administrative Order), and has since been replaced by Administrative Order 431/11, requires the plaintiff's counsel in a residential mortgage foreclosure action to file with the court an affirmation confirming the accuracy of the plaintiff's pleadings. In cases pending on the effective date of the Administrative Order, where no judgment of foreclosure has been entered, the attorney affirmation is required to be filed at the time of filing of either the proposed order of reference or the proposed judgment of foreclosure ([see \*US Bank, NA v Boyce\*, 93 AD3d 782](#) [2nd Dept 2012]).

By order dated February 23, 2011, this Court directed the NCMC to submit the required attorney affirmation applicable to residential mortgage foreclosures set forth in Administrative Order 548/10 within 60 days (hereinafter "the compliance order"). It did not do so. On August 29, 2011, this Court issued an order dismissing the complaint without prejudice (hereinafter "the dismissal order") based on the plaintiff's failure to comply with the compliance order. On September 1, 2011 the dismissal order was entered with the KCCO

NCMC's counsel has averred in his affirmation that he did not become aware of the compliance order nor dismissal order until sometime on or shortly before March 28, 2012. On [\*4]March 28, 2012, NCMC filed the required attorney affirmation contemplated by the Administrative Order with the KCCO. Its counsel contends that by filing the affirmation in May of 2012, NCMC has complied with the Court's compliance order. He further contends that pursuant to CPLR 5015(a)(1) the late filing of the affirmation should be excused and the dismissal order should be vacated because the motion for an order of reference is meritorious.

CPLR 5015(a)(1) provides in pertinent part as follows:

Relief from judgment or order. (a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry."

A party seeking to vacate an order pursuant to CPLR 5015(a)(1) must demonstrate both a reasonable excuse for the default and the existence of a potentially meritorious defense" (*Orange County Dept. of Social Services ex rel. Misty F.-R. v Germel Y.*, — NYS2d —, 2012 WL 6604524 [2nd Dept 2012]). A motion pursuant to CPLR 5015(a)(1) must be made by order to show cause and not by notice of motion (*see Smith v Smith*, 291 AD2d 828 [4th Dept 2002]).

Plaintiff has moved by notice of motion and not by order to show cause and no one has appeared or submitted opposition to the motion. Under these circumstances, the Court cannot disregard the procedural error as harmless. Therefore, the failure to move by order to show cause provides an independent basis for denying plaintiff's request. However, the denial would be without prejudice.

Both the compliance order and dismissal order are annexed to NCMC's instant motion papers and contain the KCCO's stamp of the date of their entry. The compliance order was entered on April 11, 2011 and the dismissal order was entered on September 1, 2011. NCMC's counsel states that on September 15, 2011, plaintiff's servicing agent changed counsel and that he, as current counsel, was unaware of the filing of any order or motions involving the prior counsel. NCMC's current counsel, however, did not submit an affirmation of plaintiff's prior counsel explaining why the plaintiff did not obey the compliance order. Nor did he state when NCMC became aware of the compliance order and dismissal order. Under these circumstances, the lack of awareness of the compliance order by NCMC's current counsel's does not provide a valid excuse for its failure to comply.

There is no dispute that NCMC did not file the requisite attorney affirmation contemplated by the Administrative Order until nearly six months after the action was

dismissed and nearly a year after the date of entry of the compliance order. Assuming for the sake of argument that its current counsel first became aware of the compliance order and dismissal order on March 28, 2012, NCMC has offered no explanation for waiting over five months from the date of the dismissal order to make the instant motion. The Court does not accept NCMC's claim of "law office failure" to excuse the default in failing to provide the requisite attorney affirmation. In the absence of a reasonable excuse, the court need not determine whether NCMC has a meritorious claim ([see \*Herrera v MTA Bus Co.\*, 100 AD3d 962](#) [2nd Dept 2012]). [\*5]

Although the Court need not determine whether NCMC has a meritorious claim, for the reasons set forth below the Court cannot and does not find that they have a meritorious claim. The Court cannot find that the motion for an order of reference is meritorious because the plaintiff has not annexed the originally submitted motion papers of its two prior motions.

With regard to the order of reference annexed as exhibit J to the instant motion, the Court takes note of the following salient facts. The affirmation of plaintiff's counsel in support of the instant motion dated July 23, 2012 states the following salient facts in paragraphs four through six. The instant action is to foreclose a mortgage executed by Alexander Kogan on August 6, 2006 in the amount of \$1,127,840.00. NCMC secured the mortgage with a note dated June 23, 2006. On February 23, 2007, NCMC assigned the mortgage and note to REO Properties Corporation. There were other assignments of the mortgage and note thereafter.

On March 7, 2007, twelve days after NCMC assigned the mortgage and note to REO Properties Corporation, it commenced the instant foreclosure action by filing a summons and complaint and notice of pendency with the KCCO. Therefore, based on the representations of its counsel and supporting documents, NCMC did not own the mortgage and note at the time it commenced the instant action. NCMC therefore had no standing to commence the action or to move for an order of reference ([see \*Deutsche Bank Nat. Trust Co. v Haller\*, 100 AD3d 680](#), 682 [2nd Dept 2012]).

## CONCLUSION

Plaintiff's motion for an order vacating the August 29, 2011 order dismissing the instant complaint is denied.

Plaintiff's motion for an order granting leave to reargue its application for an order of reference is denied.

Plaintiff's motion for an order overturning the prior determination denying the order of reference is denied.

Plaintiff's motion for an order granting its third motion for an order of reference is denied.

The foregoing constitutes the decision and order of this court.

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