

## **US Bank, N.A. v Damiano**

Supreme Court of New York, Suffolk County

December 8, 2017, Decided

68506/14

### **Reporter**

2017 N.Y. Misc. LEXIS 5021 \*; 2017 NY Slip Op 51845(U) \*\*

**[\*\*1]** US Bank, National Association, as Trustee for the Holders of the Banc of America Funding Corporation 2008-FT1 Trust, Mortgage Pass-Through Certificates, Series 2008-FT1, Plaintiff, against Robert R. Damiano, Jr., PAOLA DAMIANO THE LAW OFFICES OF ROBERT W. DAPELO, ESQ., PC, TOWN SUPERVISOR OF THE TOWN OF BROOKHAVEN, and "JOHN DOE" and "MARY DOE", said names being fictitious, it being the intention of plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein, Defendants.

**Notice:** THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

### **Core Terms**

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notice, cross motion

**Counsel:** **[\*1]** For Plaintiff: RICHLAND & **FALKOWSKI**, Astoria, NY.

For Damiano, Defendant: HYNES LAW FIRM, PC, Garden City, NY.

**Judges:** THOMAS F. WHELAN, J.S.C.

**Opinion by:** THOMAS F. WHELAN

### **Opinion**

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Thomas F. Whelan, J.

**ORDERED** that this motion (#001) by the plaintiff for, among other things, an order of reference and the appointment of a referee to compute, is granted in its entirety, and it is further

**ORDERED** that the cross motion (#002) by the defendant, Robert Damiano, Jr., for dismissal pursuant to [CPLR 3215](#) or for an extension of time to serve a late answer, pursuant to [CPLR 2004](#), is denied in its entirety, and it is further

**ORDERED** that the proposed Order submitted by plaintiff, as modified by the court, is signed simultaneously herewith and it is further

**ORDERED** that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR § 202.5-b(h)(3).

The foreclosure action was commenced by filing on October 13, 2014. The matter was reassigned to this Part pursuant to Administrative Order No. 110-17, dated September 28, 2017 and submitted for decision on October 19, 2017. In essence, on October 3, 2002, the defendants, Robert R. Damiano, Jr. and Paola Damiano, borrowed, upon a promise to repay, \$170,000.00 from the plaintiff's **[\*2]** predecessor-in-interest and executed a promissory note and mortgage. However, the defendants subsequently defaulted on May 15, 2009. It was plaintiff's position in the motion (#001), that the defendants failed to answer this action. On August 11, 2015, this matter was released from the Foreclosure Settlement Conference Part, after prior conferences, which were held on May 11, 2015 and June 11, 2015. The loan was subsequently assigned to NS163, LLC and there was also a substitution of plaintiff's counsel. Defendant, Robert Damiano, Jr., by his counsel, filed a notice of appearance on August 1, 2017.

In his cross motion, defendant, Robert Damiano, Jr., at paragraph 7 of his affidavit, swears under oath that "[i]n or about December 2014, I submitted an Answer to the bank in connection with said Summons with Notice and Verified Complaint as a *Pro Se* Litigant." He further avers, at paragraph 12, "I ask that the Court excuse my tardiness in serving Plaintiff with a belated Answer with

Affirmative Defenses to its Complaint and to compel Plaintiff to accept the same, as I did not previously have an Attorney and erroneously sent same directly to the bank, and not Plaintiff's Attorney." Defendant's [\*3] counsel, in paragraph 10 of her affirmation states that defendant "appeared in this matter as a pro se litigant by submitting a response to plaintiff's Summons with Notice and Complaint, however, directly to Plaintiff" (emphasis added) (see also, pars. 20, 27).

Defendant's notice of cross motion (#002) is dedicated to a claim that the plaintiff is not entitled to a default judgment due to its abandonment of its claim for foreclosure and sale under [CPLR 3215\(c\)](#). This statutory provision requires the plaintiff to take proceedings for the entry of a judgment within one year after the default and if it does not, the complaint shall be subject to dismissal as abandoned by the court unless sufficient cause is shown why the complaint should not be so dismissed. Nevertheless, a defendant may waive the right to seek relief under [CPLR 3215\(c\)](#) by serving an answer or taking "any other steps which may be viewed as a formal or informal appearance" ([HSBC Bank USA, Natl. Assn. v Grella](#), 145 AD3d 669, 44 NYS3d 56 [2d Dept 2016] quoting [Myers v Slutsky](#), 139 AD2d 709, 527 NYS2d 464 [2d Dept 1988]; see [DeLourdes Torres v Jones](#), 26 NY3d 742, 772, 27 NYS3d 468, 47 N.E.3d 747 [2016]; [HSBC Bank USA v Lugo](#), 127 AD3d 502, 503, 9 NYS3d 6 [2d Dept 2015]; [Hodson v Vinnie's Farm Mkt.](#), 103 AD3d 549, 959 NYS2d 440 [2d Dept 2013]; [Gilmore v Gilmore](#), 286 AD2d 416, 730 NYS2d 239 [2d Dept 2001]).

The Second Department recently reaffirmed the rule that a defendant may waive the right to seek relief under [CPLR 3215\(c\)](#) by his or her conduct (see [Bank of America, N.A. v Rice](#), \_\_\_ AD3d \_\_\_, 63 NYS3d 486 [2d Dept 2017]).

Here, the record reflects that the defendant attempted [\*4] to serve an untimely answer in 2014. The Court believes that an application before the Court constitutes a search for the truth and credits defendant's contention. In addition, the defendant appeared in this action by his current counsel upon the filing of his unqualified notice of appearance on August 1, 2017 (see [Bank of America, N.A. v Rice](#), *supra*). The defendant has thus waived any claims to relief under [CPLR 3215\(c\)](#).

Moreover, the plaintiff has shown sufficient cause as to why the complaint should not be dismissed (see [HSBC Bank USA, Natl. Assn. v Hasis](#), 154 AD3d 832, 62

[NYS3d 467 \[2d Dept 2017\]](#); [Wells Fargo Bank, N.A. v Kahana](#), 153 AD3d 1300, 59 N.Y.S.3d 705, 2017 WL 4018405 [2d Dept 2017]; [Bank of New York Mellon v Adago](#), \_\_\_ AD3d \_\_\_, 63 NYS3d 495 [2d Dept 2017]).

The Court denies the branch of defendant's cross motion which seeks an extension of time to serve a late answer. Initially, defendant fails to attach a proposed Answer to the motion [\*2] papers (see [Gershman v Ahmad](#), 131 AD3d 1104, 16 NYS3d 836 [2d Dept 2015]; [Karalis v New Dimensions HR, Inc.](#), 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]). Additionally, the lack of an affidavit of merit requires dismissal of the [CPLR 2004](#) motion (see [Tewari v Tsoutsouras](#), 75 NY2d 1, 549 N.E.2d 1143, 550 NYS2d 572 [2d Dept 1989]). More importantly, defendant fails to provide a reasonable excuse for the more than three year delay (see [Bank of New York Mellon v Adago](#), \_\_\_ AD3d \_\_\_, 2017 N.Y. App. Div. LEXIS 7659, *supra*; [Bank of New York Mellon v Izmiriligil](#), 144 AD3d 1067, 44 NYS3d 44 [2d Dept 2016]; [LNV Corp. v Forbes](#), 122 AD3d 805, 996 NYS2d 696 [2d Dept 2014]).

Plaintiff's unopposed motion is granted since it demonstrated its entitlement to a default judgment and an order of reference (see [RPAPL 1321](#); [CPLR 3215\[f\]](#); [HSBC Bank USA, Natl. Assn. v Hasis](#), 154 AD3d 832, 62 N.Y.S.3d 467, *supra*; [\*5] [Wells Fargo Bank, N.A. v Mayen](#), \_\_\_ AD3d \_\_\_, 2017 N.Y. App. Div. LEXIS 7805, 2017 WL 5162798 [2d Dept 2017]; [Wells Fargo Bank, N.A. v Lilley](#), 154 AD3d 795, 62 NYS3d 155 [2d Dept 2017]; [Deutsche Bank Natl. Trust Co. v Patrick](#), 136 AD3d 970, 25 NYS3d 364 [2d Dept 2016]).

Therefore, the Court grants plaintiff's motion (#001) in its entirety, denies defendant's cross motion (#002) in its entirety and simultaneously signs the proposed Order, as modified.

DATED: December 8, 2017

THOMAS F. WHELAN, J.S.C.

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