NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA-5

JP MORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff,

-against-

, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR FIRST MAGNUS FINANCIAL CORPORATION, "JOHN DOE #1-5" and "JANE DOE #1-5" said name being fictitious, it being the intention of the Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest or lien upon the mortgaged premises being foreclosed herein,

Defendants.

INDEX NUMBER:

Present:
HON. ALISON Y. TUITT
*Justice*

The following papers numbered 1 to 3,

Read on this Defendant Motion to Dismiss the Action

On Calendar of 3/24/14

Notice of Motion -Exhibits, Affidavit, Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendant ; motion to dismiss the action is granted for the reasons set forth herein.

The within action filed on or about May 27, 2009 to foreclose a mortgage in the amount of $484,000.00 by defendant Moluh on July 16, 2007 affecting the premises know as . The affidavit of service of process server Robert A. Winckelmann provides that on June 4, 2009 at

12:10 pm at , : he served a woman of "suitable age and discretion" by leaving the Summons and Complaint with Notice of Pendency of Action with ' and by mailing the papers through the United States Post Office addressed to on June 5, 2009 at the aforementioned address. Defendant disputes that he was served as no one with that name or with the physical description provided in the affidavit of service resides there. Defendant argues that the only adult female that resides at that premises is Assumed : and she does not share his surname. Defendant further submits the affidavit of his wife's employer who states that on the purported date and time of service, was at work.

Defendant moves to dismiss the action on numerous grounds, including the purported failure to serve him with the Summons and Complaint, and the failure of plaintiff to move for a default judgment within one year of the alleged default by defendant. Pursuant to CPLR §3215 ( c), if plaintiff fails to move for entry of judgment within one year of a default by a defendant, the complaint shall be dismissed as abandoned. Here, the action was commenced on or about May 27, 2009. Plaintiff brought a motion for an Order of Reference on or about February 2, 2010, but then withdrew the motion. The Court scheduled a foreclosure settlement conference for June 24, 2011. Defendant failed to appear and the matter was released from the settlement conference part. Other than commencing the action and making the motion and then withdrawing it, plaintiff has not taken any other action in this matter.

Specifically, CPLR §3215 ( c) provides as follows: "Default not entered within one year. If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." Here, plaintiff argues that "[u]nder the unique circumstances that have arisen with regard to the prosecution of foreclosure proceedings and the resulting required document review..., and the settlement conference process itself, it is often not possible for the Plaintiff to obtain judgment within one year of default... Unfortunately, Plaintiff could not review the mortgagors for all settlement options, conduct a thorough review of the documentation submitted to the court, confirm that affidavits contained proper notarizations and communicate its findings to Plaintiff's attorney in time for Plaintiff's attorney to also complete a thorough review and to execute the required affirmation and affidavits in compliance with the October 2010 directive and CPLR §3215."

Plaintiff's proffered excuse for failing to move for a default judgment is without merit. It has now been five and a half years since this action was instituted. Plaintiff fails to specifically identify what has cause this extremely lengthy delay in prosecuting this action. Plaintiff filed a Summons and Complaint and then did basically nothing for five and a half years. Its generic, bald and conclusory excuse clearly falls shore of "sufficient cause" shown as "why the complaint should not be dismissed." The language of CPLR 3215© is not, in the first instance, 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. Giglio v. NTIMP, Inc., 926 N.Y.S.2d 546 (2d Dept. 2011) citing Butindaro v. Grinberg, 871 N.Y.S.2d 317 (2d Dept. 2008); DuBois v. Roslyn Natl. Mtge. Corp., 861 N.Y.S.2d 73 (2d Dept. 2008); County of Nassau v. Chmela, 846 N.Y.S.2d 299 (2d Dept. 2007); Kay Waterproofing Corp. v. Ray Realty Fulton, Inc., 804 N.Y.S.2d 815 (2d Dept. 2005). The one exception to the otherwise mandatory language of CPLR 3215© is that the failure to timely seek a default on an unanswered complaint or counterclaim may be excused if "sufficient cause is shown why the complaint should not be dismissed". This Court has interpreted this language as requiring both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious. Giglio citing Ryant v. Bullock, 908 N.Y.S.2d 884 (2d Dept. 2010); Solano v. Castro, 902 N.Y.S.2d 95 (2d Dept. 2010); 115–41 St. Albans Holding Corp. v. Estate of Harrison, 894 N.Y.S.2d 896 (2d Dept. 2010; Sicurella v. 111 Chelsea, LLC, 888 N.Y.S.2d 752 (2d Dept. 2009); DuBois v. Roslyn Natl. Mtge. Corp., 861 N.Y.S.2d 73 (2d Dept. 2008); County of Nassau v. Chmela, 846 N.Y.S.2d 299 (2d Dept. 2007); Durr v. New York Community Hosp., 840 N.Y.S.2d 430 (2d Dept. 2007); Costello v. Reilly, 828 N.Y.S.2d 172 (2d Dept. 2007); Kay Waterproofing Corp. v. Ray Realty Fulton, Inc., 804 N.Y.S.2d 815 (2d Dept. 2005); London v. Iceland Inc., 761 N.Y.S.2d 862 (2d Dept. 2003). The determination of whether an excuse is reasonable in any given instance is committed to the sound discretion of the motion court. Giglio citing Staples v. Jeff Hunt Devs., Inc., 866 N.Y.S.2d 756 (2d Dept. 2008); Costello v. Reilly, 828 N.Y.S.2d 172 (2d Dept. 2007); Ewart v. Maimonidies Med. Ctr., 657 N.Y.S.2d 210 (2d Dept. 1997).

The excuse of failing to timely move for a default judgment - that it had not yet been able to prepare an affirmation in compliance with Administrative Order 431/11 of the Chief Administrative Judge of the Courts - does not constitute a sufficient and substantiated reason for not being able to review its records within the one year period to confirm the accuracy of its pleadings. See, Freedom Mortg. Corp. v. Akther, 975

N.Y.S.2d 709 (Sup. Ct. Queens Cty. 2013) citing Costello v. Reilly, 828 N.Y.S.2d 172 (2d Dept.2007) (Unsubstantiated excuse proffered by plaintiff's counsel not deemed reasonable); BAC Home Loans Servicing, LP v. Musa, 35 Misc.3d 1241A (Sup.Ct., Dutchess Cty. 2012)(Action dismissed where not moved into foreclosure settlement part in two and half years); Onewest Bank, FSB v. Ryes, 37 Misc.3d 1202A (Sup.Ct. Queens Cty.2012); U.S. Bank N.A. v. Solorin, 34 Misc.3d 292 (Sup. Ct Queens Cty. 2011).

In the instant action, the Court finds that plaintiff failed to timely move for a default judgment and its proffered excuse for failing to prosecute the action or seek a default judgment against defendant is not meritorious. Accordingly, defendant's motion to dismiss the action is granted. Since the action is dismissed pursuant to CPLR §3215, the Court has not considered defendant's alternate grounds for dismissal.

This constitutes the decision and Order of this Court.

Dated: 1/5/15

A. Y. Tuitt

Hon. Alison Y. Tuitt